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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 326

J. H. STEPHENSON ET AL., APPELLANTS,

vs.

T. BINFORD ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

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Opinions.

The opinion of the statutory three-judge court denying the temporary injunction (R. 129-142) is reported in 53 Federal (2d) 509, and the final opinion on the merits (R. 288) is not yet officially reported.

The Statutes and Questions Involved.

The Act in question (Chapter 277, 42nd Texas Legislature) was approved June 6, 1931. It is designed to regulate the use of the public highways by common and contract carriers for hire; it empowers the Railroad Commission of Texas to administer and supervise the enforcement of its provisions. It has the three-fold purpose of highway protection, traffic safety, and the maintenance of a coordinated transportation system by rail and highway.

The legislative purpose and policy is declared as follows:

> "SECTION 22*b*. Declaration of Policy.—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways-and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may

serve the best interest of the general public." (R. 31-32.)

The validity of those provisions of the act which were adopted in the interest of traffic safety and highway protection are not here seriously questioned (R. 131-132). Briefly, they require licensed and competent drivers; limit the hours of continuous service for drivers; require carriers to secure the public against loss for personal injuries; authorize inspection of equipment used and approval or disapproval thereof; regulate the manner of loading, the size and character of packages, and the weight of loads; authorize the Commission to classify the highways with reference to traffic congestion, and their ability to withstand varying transportation uses, and vest the Commission with general supervision over the highways and the carriers using them in the interest of their preservation and public safety thereon.

The other provisions of the act relate to the Commission's supervision over the rates and service of carriers and their relationship to the shipping public; to the public convenience and necessity in case of common carriers and to the effect of proposed contract carrier operations upon the efficient public service of existing common carriers; to the Commission's power to prescribe maximum and minimum rates for common carriers and to fix the minimum rates of contract carriers operating in competition with common carriers; to the requirements for maps of the territory to be covered by proposed operations, showing existing transportation facilities; insurance; penalties for

violating rate orders; penalties for discriminatory rates and practices and rebates, and requirements for keeping of accounts, and reports on same to the Commission.

Appellants allege they are private contract carriers and that their business is wholly unaffected with the public interest. They make the oft repeated charge that the act undertakes to convert them into common carriers and that the burdens and duties imposed upon them by it are in no wise dissimilar from those it imposes upon common carriers. Hence both the common and contract carrier provisions should be considered.

The act makes it the duty of the Commission to regulate all "motor carriers." Section 1(*g*) defines the term "motor carrier" to mean "any person * * * operating * * * any motor propelled vehicle used in transporting property for compensation or hire over any public highway in this state, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; * * *." It does not apply to motor vehicles operated exclusively within the incorporated limits of cities and towns (R. 13).

Section 1(*h*) defines the term "contract carrier" to mean "any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier" (R. 13).

The act does not undertake to define the term "common carrier," leaving the determination of that ques-

tion to the Commission in each particular case as the facts may warrant.

Section 6(*d*) authorizes the Commission to issue to persons "who desire to engage in the business of transporting for hire over the highways of this State live stock, mohair, wool, milk, live stock feed stuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain, special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations keeping in mind the protection of the highways and the safety of the traveling public; * * *" (R. 18).

Thus, the act divides persons transporting property for hire into two general classes. They are, first, common carriers, which includes all those whose operations bring them within the meaning of that term as it is understood and defined by the decisions of the courts; and, second, contract carriers composed of all persons hauling for hire, whose operations do not make them common carriers in fact. One operating under a special permit authorized by Sec. 6(*d*) is either a common or contract carrier, depending upon the nature of his operations. In either event he is subject to either common or contract carrier regulation under the act.

Motor carrier operations without a permit or certificate are prohibited by Section 3 in the following terms:

> "SECTION 3. No motor carrier shall, * * * operate as a common carrier without first having obtained from the Commission, * * * a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity requires such operation. No motor carrier shall * * * operate as a contract carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things complied with the requirements of this act" (R. 13-14).

Section 4 is a general grant of power and authority making it the Commission's duty to supervise and regulate the transportation of property for hire, to fix rates subject to specific provisions, and to adopt rules and regulations for the government of carriers and for safety of operations, and to supervise motor carriers in all matters affecting the relationship between them and the shipping public that may be necessary in the public interest (R. 14-15). In the case of common carriers the Commission is required to prescribe schedule and service regulations (R. 14).

The following section limits the Commission's power to prescribe rates for contract carriers:

> "SEC. 6*aa*. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to

be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service" (R. 19).

The following sections govern contract carrier applications:

"SECTION 6. (*a*) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier. * * *

"(*b*) No application for a permit shall be considered by the Commission unless it be reduced to writing and sets forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The application shall set forth the nature of the transportation in which the applicant wishes to engage, stating substantially the territory to be covered by the operation and including the condition and character of the roads over which the transportation is to be performed.

"(3) It shall give a description of each vehicle which the applicant intends to use, including weight and size of vehicle and its carrying capacity.

"(*c*) No application for permit shall be granted by the Commission until after a hearing nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory; * * *" (R. 16-18).

Common carrier applications are governed as follows:

"SECTION 8. The Commission is hereby vested with power and authority, and it is hereby made its duty upon the filing of an application for a certificate of public convenience and necessity to ascertain and determine under such rules and regulations as it may promulgate, after considering existing transportation facilities, and the demand for, or need of additional service, if there exists a public necessity for such service, and if public convenience will be promoted by granting said application and permitting the operating of motor vehicles on the highways designated in such application as a common carrier for hire (R. 20).

"SECTION 9. The Commission shall ascertain and determine if a particular highway or highways designated in an application for a certificate of public convenience and necessity are of such type of construction or in such state of

repair, or subject to such use as to permit of the use sought to be made by the applicant, without unreasonable interference with the use of such highways by the general public for highway purposes. And if the Commission shall determine, after hearing, that the service rendered by existing transportation facilities or agencies is reasonably adequate, or that public convenience would not be promoted by granting of said application, and the operation of motor vehicles on the public highways therein designated, or that such highway or highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes then in either or any of such events said application may be denied and said certificate refused, otherwise the application shall be granted and the certificate issued upon such terms and conditions as said Commission may impose and subject to such rules and regulations as it has or may thereafter prescribe.

"In determining whether or not a certificate should be issued to a motor carrier, the Commission shall give weight and due regard to:

"(1) Probable permanence and the quality of service offered by the applicant.

"(2) The financial ability and responsibility of the applicant and its organization and personnel.

"(3) The character of vehicles and the character and location of depots or termini proposed to be used.

"(4) The experience of the applicant in the transportation of property and the character of

the bond or insurance proposed to be given to insure the protection of the public (R. 20-21).

"SECTION 10. No application for a certificate of public convenience and necessity shall be considered by said Commission unless it be in writing and set forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The complete route or routes over which the applicant desires to operate, together with the description of each vehicle which the applicant intends to use.

"(3) A proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served.

"(4) It shall be accompanied by a plat or map showing the route or routes over which the applicant desires to operate, on which plat or maps shall be delineated the line or lines of any existing transportation company or companies serving such territory, and shall point out the inadequacy of existing transportation facilities or service and shall specify wherein additional facilities or service are required and would be secured by the granting of said application.

"The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the conditions of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the

> Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between which motor carriers operate" (R. 21-22).

Both common and contract carriers are required by Section 13 to file with the Commission "bonds and insurance policies * * * in an amount to be fixed by the Commission * * * which * * * shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carriers * * * based on claims for loss or damages from personal injury or loss of, or injury to, property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carriers" * * *. Both are required to carry workmen's compensation insurance for the protection of their employees (R. 24-25).

Both classes of carriers are required by Section 13b:

> * * * "to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission and to file reports and such other data as the Commission may deem necessary, and which said accounts

shall be open to the inspection of the Commission or its representatives at all times'' (R. 26).

The other provisions of the act relate to the manner of holding hearings, provide for its enforcement, fix the fees and prescribe penalties for violations (R. 26-30).

The questions raised by appellants' assignment of errors are:

1. Are its provisions tantamount to a requirement that they dedicate their property to the quasi public use before being permitted to operate as contract carriers over public highways? Even if the act has the effect claimed by appellants, does it necessarily follow, in view of all the circumstances surrounding their operations and others of their class, that its provisions are violative of the due process clause of the Constitution? (Assignment 1, R. 289).

2. Is there any sound basis for the contention that appellants' business is in no sense affected with a public interest? As a matter of law and fact, is it not reasonable to hold that contract carriage is now a business affected with a public interest, considering conditions which have developed within recent years on the public highways and which now obtain thereon, and considering further the destructive effect of such operations upon the industrial and economic life of the State, and with special emphasis upon the fact that they are making merely a permissive use of public property as a place of business? Even if their business is not so affected, as a matter of law, does the due

process clause operate so as to deny the State's power to enforce the regulations of the act in the public interest, and in preserving a dependable transportation system for the whole people? (Assignment 2, R. 289-290).

3. Does the act impose the same burdens upon contract and common carriers, and does it regulate the business of contract carriers in violation of the due process clause? (Assignment 3, R. 290-291).

4. Is the act subject to the construction that its provisions are not applicable to persons operating under special permits provided by Section 6(*d*) and, for that reason, discriminatory? Even if subject to such a construction, are appellants in a position to complain? (Assignment 4, R. 291).

5. Is the act discriminatory because it does not apply to persons transporting their own property over the highways in their own vehicles? (Assignment 5, R. 291).

In each instance the court below decided against the contention of the appellants and in favor of the validity of the law.

Statement.

Since we cannot agree with the inaccurate statements made by appellants concerning the nature and extent of their operations, the substance of the testimony of record or the effect of the various requirements of the act, we submit the following statement of the material matters involved:

"Faced with the grave necessity of adequately regulating motor traffic on the highways of Texas in the interest at once of the safety of the traveling public, the protection of the highways, and the maintenance of a safe and dependable transportation system, both by rail and by road for the people of the State, the Forty-second Legislature of Texas, at its regular session, enacted into law a legislative program designed and comprehensive enough to deal with and to remedy the mischiefs incident to unregulated use of the highways, including those arising from the unprecedented use of the highways by private contract carriers for hire." (Judge Hutcheson, in opinion denying temporary injunction, 53 Fed. (2d) 509, R. 129-130).

One phase of that program was before this Court in the case of *Sproles v. Binford*, 286 U. S. 374, decided May 23, 1932. That case sustained the act (Chapter 282, 42nd Legislature, 1931) which was designed primarily to protect the highways and remove traffic hazards. It limits the dimensions and loads of motor vehicles, regulates speed, brakes, and other appliances in the interest of safety, and applies generally to all persons operating trucks and busses over the highways.

It is important to note that the act under attack in the Sproles case, and that assailed in this case, were adopted as companion measures at the same legislative session. The latter was approved June 5, and the former on June 11, 1931. Since they were consid-

ered together, we may assume they represent that body's best judgment of the regulations necessary to solve the great problems with which it dealt.

This act seeks the solution of a problem which is far more complex and difficult than those we have mentioned. As we shall show, unregulated and unrestrained contract carrier operations had, within the short period of five or six years, all but destroyed the business of the common carrier truck lines; very seriously impaired the service of railways and greatly depleted their revenues; destroyed interior markets, and disturbed and injured business conditions generally with their discriminatory rates and practices.[1] Evidence of these evil consequences were plainly seen on all hands. (See digest of evidence, pages 46 to 76 of this brief.)

The court judicially knows that this perplexing problem is not peculiar to Texas. It has reviewed the legislative efforts of a number of states to solve it. The decisions of the courts show that many of the states have undertaken to meet similar situations but

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[1] "To achieve the maximum benefits of the new facility consistent with a minimum degree of duplication of service, it is necessary that rail and motor competition be conducted under an equality of opportunity and that service which, upon comparison of delivery time and rates, is found to be a duplication should be limited within proper bounds. * * * Such competitive conditions may temporarily benefit some shippers but, if continued unchecked, are bound to result in permanent injury." 182 I. C. C. 376.

without success.[2] As Judge Hutcheson stated, "Most of the courts have felt constrained by the Frost decision to deny to the State the right to make existing regulations as to common carriers applicable to private carriers; many of them have avoided the difficulty by finding that the carriers involved were in fact not private, but common carriers, while some of them have sustained the statutes on the ground that they did not attempt to convert private carriers into common carriers, but in effect imposed specific legal regulations upon each class of carrier, to which each must conform" (R. 136).

Emphasis in this law, however, is laid upon the great public interest involved and the state's power and duty to act for the general welfare in the protection of that interest. If the Legislature had approached the problem from the viewpoint of only one truck and one contract, the gravity of the situation would have been missed entirely. It is only by considering the aggregate effect of such carriers by multiplying one truck and one contract by the thousands so operating that its real import can be appreciated.

There is a direct relationship between the maintenance of a dependable transportation system and

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[2] "All of the states, except Delaware, have laws regulating the operation of motor vehicles as common carriers of passengers. Thirty-nine states have laws regulating operation of such vehicles as common carriers of property, and thirty-four states have enacted laws dealing with the operation of truck contract carriers. This fact is the evidence of the need for regulation." 182 I. C. C. 371.

the problems of highway safety and protection which can be better understood with a brief statement of general traffic conditions of the State.

In many respects the transportation problems of the State are unique. Its immense area requires approximately 200,000 miles of public highways to connect its various communities (R. 240). The great distances between its marketing centers have made it economically impossible to construct a complete system of improved roads (R. 239). Consequently, it has been necessary to limit to the absolute minimum the number of transstate roads of the higher grades capable of accommodating modern commercial uses (R. 239-241).

The State and the several counties have expended hundreds of millions of dollars of the public funds in constructing their highways [3] (R. 253). To bring this system up to the modern type necessary for excessive uses would cost many hundred million dollars more. This cost is too great to be borne by the people (R. 239).

Due to the limited number of cardinal highways of rigid or improved types, traffic congestion has become a most serious problem. Naturally, because of their improved condition traffic in unprecedented volume

[3] "The growing use of trucks necessitates extensive financing of highway construction and maintenance; their operation is attended by danger to persons and property on or in the vicinity of the highways and is hazardous to the public." 182 I. C. C. 375.

has flowed into them rather than taking the roads of inferior character (R. 250-251).

The phenomenal increase in private automobiles during the past fifteen years is a matter of common knowledge and history. It is not too much to say that modern highway construction found its greatest support among persons who desired to make only the ordinary use of them. These highways were designed and constructed principally to accommodate these private uses. Today the highways are crowded with millions of such vehicles carrying their occupants from home to office, from farm to market, and from city to city. Many of them are crowded to the limits of safety and convenience with private vehicular traffic.

It has only been within recent years that motor trucks have created a menace on the highways. They increased 300 per cent in the past six years in Texas, there having been 206,000 registered in 1930 (R. 252.) These vehicles do not include the tremendous increase in interstate trucks, which is a more recent development (R. 254). During the past three years truck traffic has increased in density from 40 per cent to 500 per cent on the various highways of Texas (R. 256).

This extraordinary increase in traffic, both of trucks and automobiles, presented serious problems. First was the fact that heavy trucks were destroying the highways which had cost millions to build. The money used to construct them had been borrowed for long periods of time and the taxpayers faced the prospect of having their roads destroyed many years before they had paid for them (R. 239).

Again, there was an excessive maintenance cost which had resulted from those unusual uses. It cost the State an average of twelve million dollars per year for the past three years for the maintenance of State highways alone. This figure does not include the maintenance cost of the counties for the more than 180,000 miles of county highways (R. 253).

Not only did this traffic destroy the highways and require excessive and burdensome expenditures for maintenance but the unusual dimensions, weight and speed of trucks and the density of traffic generally greatly endangered the lives and property of those who were entitled to use them in the usual and ordinary way.

In the year 1931 the situation became so acute that a change in legislative policy was essential in the public interest. The unprecedented increase in carriage for hire over the highways had all but crowded the average citizen off of them. Either carriage for hire by road must be held within reasonable bounds or it would be only a matter of time until the highways would have to be surrendered for their exclusive use. The act in question, or one similar to it, seems to be the only fair solution of that problem.

The grave problems of highway protection and of safety and convenience in the ordinary and usual use thereof were only partially solved by the act sustained in the Sproles case. While that law reduces the load and dimensions of motor trucks, it accomplishes little or nothing toward relieving the highways of congestion and unnecessary uses, which contribute as much or more to highway damage and hazards and public

inconvenience than any other factor (R. 255). One major purpose of the act, in the instant case, is to remedy those mischiefs (R. 31-32).

It is of vital importance to the State that its Railroad Commission be clothed with power to accomplish those desirable ends. If it is to be denied the power to regulate and limit the volume of the extraordinary commercial uses now made of its highways the only other course open to it is to prohibit such use altogether.

That restriction and regulation of this new form of transportation is absolutely essential to the welfare of the people will be better understood by noting briefly the history of transportation in Texas.

It is a matter of judicial history that Texas was a pioneer in railroad regulation. Since the construction of the first railroad in the State, more than seventy-five years ago, transportation problems have received more attention from its lawmakers than any other branch of law. Thousands of cases resulting in a great body of precedents have been decided by its judicial tribunals. Numerous statutes have been enacted, both to regulate and control, and to relieve and encourage railroads, as well as other forms of carriers.

The State's policy is largely explained by the fact that the distances between its producing areas and its outlets are so great. The great bulk of its products, such as cotton, grain, oil and livestock, are moved hundreds of miles, wholly within the boundaries of the State. Movements hundreds of miles in extent originate and end within its boundaries. Its vast exports are moved to its port cities without crossing State

lines. Thus it is apparent that its greatest problems are chiefly of local concern.

Because of these facts the State has always been especially dependent upon railroads and other means of transportation. In order to insure the development of its natural resources it was deemed sound public policy in the early days to give the railroads millions of acres of the public domain to encourage their extension to all parts of the State. This generous policy resulted in the construction of more than 16,890 miles of railways in Texas and represents an investment of over nine hundred million dollars (R. 263 and 276).

A great army of so-called "private" contract carriers suddenly entered the transportation field. By the year 1931 they had taken so much tonnage from the State's railway systems that many of them were threatened with bankruptcy. Railway service was seriously impaired. Common carrier truck lines suffered tremendously and were fast disappearing from the highways (R. 244-5, 247).

Contract carriers were selecting and taking the cream of the transportation business and leaving the low grade and less profitable hauls for the railways. In great swarms they plied their business on public property without regulation and in total disregard of the public welfare (R. 244).

Looking at any one of them at any given time revealed only a few trucks with a few "private" hauling contracts. That same one, however, since his business was that of hauling for hire, would have many contracts in the course of a year.

Experience had shown that unless the State could restrict the number of them and prescribe their rates, effective control would be impossible (R. 244-5, 247). If it could not enforce regulations of this character, then it was powerless to preserve and protect its great common carrier systems from destruction or serious injury. The great body of citizens who, of necessity, depended upon common carrier service would have to pay higher freight rates and would be deprived of adequate and dependable transportation facilities which their interests demanded (R. 223, 226, 284).

It was clearly evident that contract trucks were giving most serious competition to railway and common carrier truck lines with the effects already noted. It likewise was clear that this competition was unequal and unfair. With thousands of idle box-cars and empty common carrier trucks, there could be no doubt that the contract carrier service was wasteful and unnecessary. This would have been the case even under normal conditions.[4] This excess of transportation facilities explains, in a measure, the cut-throat competition which ensued (R. 281-4). It appeared certain that a solution of the problem was impossible so long as the great horde of contract carriers were per-

[4] "There is today, and probably would be under normal conditions, an excess of carrying capacity of existing transportation facilities; * * * unrestrained competition is an impossible solution of the present transportation problem and is incompatible with the aim of coordination under regulation." 182 I. C. C. 380.

mitted to engage in unrestrained competition with dependable transportation agencies (R. 244-5, 247).

The legislative judgment of these conditions is fully sustained by findings of the Interstate Commerce Commission, based on a general investigation made by it (*Coordination of Motor Transportation*, No. 23,400, 182 I. C. C. 263-430, decided April 6, 1932). It recommended Federal legislation along the lines of this act and concluded that contract motor carriers in particular should be regulated.

As Judge Hutcheson states "of all the problems pressing upon the State, none present more comprehensive, more far-reaching, more troublesome aspects, than do those arising from the effect upon the established common carrier transportation services by rail and road, of the rapidly increasing use of the highways for the carriage of freight by hire by persons assuming the real or pretended status of private contract carriers, and asserting their business to be unregulated" (R. 135).

The State, by this act, he said, "has undertaken neither to convert private carriers into common carriers nor upon the pretext of regulating highways, to impose arbitrary restrictions upon the business of those who use them. That what it has done has been to put into effect the legislative policy above referred to; that the business of carrying for hire on the public roads is a business affected with a public interest, which may be enjoyed only under legislative grant. That it has fixed the conditions of such grant, and that any person desiring to conduct his business over the public highways may, under the statutes, freely elect-

ing the character of business he will engage in, apply for, and by complying with the conditions fixed, obtain a franchise as a common or as a contract carrier, according to his desire" (R. 134-135).

"That this system of regulation," he added, "designed in the interest of the public convenience will operate to bring highway order out of highway chaos, by preventing a further disintegration of the all but practically destroyed common carrier service on the roads. That the exercise of the powers which the act confers will not only protect the roadways and the people on them from the results of reckless and careless operation, but will give to the whole people of the State a safe and dependable system of transportation for the carriage of their freight by highway" (R. 135).

Appellants allege they are private contract carriers for hire. Both at the hearing for a temporary injunction and at the trial on the merits, the three-judge court sustained the validity of the law, and, on final hearing, dismissed the bill for want of equity (R. 180).

United States District Judge T. M. Kennerly dissented from the majority opinion of the court (R. 142).

Summary of Argument.

1. The act does not undertake to convert contract carriers into common carriers. It does not require them to devote their property to any different or greater public use than that to which they have already voluntarily dedicated it. It does not require them to render any greater service than they have contracted to render. There is no taking of their property

devoted to one use and declaring it devoted to another use. It leaves them entirely free to regulate their schedules, designate their territory and routes, select their contracts, and the traffic they choose to haul. It merely fixes reasonable conditions upon purely permissive uses appellants make of public property as a place of business. The act is bottomed on the State's undoubted power to protect its highways and remove traffic hazards as well as its power and duty to foster and preserve a dependable transportation system for the whole people. The regulations of the act, including the power to fix minimum rates, extend only to those phases of contract carrier operations which adversely affect the public welfare and are reasonably related to the accomplishment of its valid purposes. *Sproles v. Binford*, 286 U. S. 374; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; *German Alliance Insurance Company v. Lewis*, 233 U. S. 389.

2. Transportation is the most important of the public services. Experience has demonstrated the absolute necessity of its regulation to preserve and protect the public interest. The business of contract carriage has grown to such enormous proportions within recent years that it threatens to destroy common carrier transportation agencies. Its manner of operation has seriously affected the economic and industrial life of the people. Its unrestrained and unregulated use of public highways, together with its discriminatory rates and practices have resulted in irreparable injury to the public welfare. Contract car-

riage has developed such a peculiar and intimate relationship to the public interest that the State's power to enforce the regulations of the act is superimposed upon it. Appellants, and the class of contract carriers who are reached by the act, are, under conditions now obtaining on the highways, engaged in a business which is affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest. *Munn v. Illinois, supra; Budd v. New York, supra; Brass v. North Dakota, supra; German Alliance Insurance Company v. Lewis, supra; Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522; *Sproles v. Binford, supra; Coordination of Motor Transportation*, 182 I. C. C. 263-430.

3. The act imposes substantially different schemes of regulation upon common and contract carriers and there is a clear differentiation between the two classes. The burdens imposed upon contract carriers are less onerous than those applied to common carriers. It authorizes no greater regulation of appellants' business than is essential to protect the great public interest involved. *Smith v. Cahoon*, 283 U. S. 553.

4. Section 6(*d*) authorizing the issuance of special permits for the transportation of certain named commodities is not open to the construction that persons operating thereunder are not subject to regulation upon the same basis as appellants. A proper construction of the act subjects special permit operators to every regulation applicable to appellants. This con-

struction avoids their contention that the act is discriminatory. *Smith v. Cahoon*, 283 U. S. 553.

The act is clearly severable and if Section 6(*d*) is invalid it, and not the act, must fall. *Williams v. Standard Oil Company of Louisiana*, 278 U. S. 241.

5. The act does not apply to persons transporting their own property in their own trucks. Its classifications are based upon the substantial differences of fact between persons making a constant and extensive use of highways in the business of hauling for hire and persons making only a limited and incidental use in the ordinary and usual pursuits of life. The distinctions are drawn upon differences in the manner and extent of those uses and there is a rational basis for them. *Sproles v. Binford, supra.*

ARGUMENT.

I.

The act does not require appellants and others of their class to devote their property to any different or greater use than that to which they have devoted it themselves. It merely fixes reasonable conditions upon purely permissive uses made of public property as a place of business in the public interest and welfare. (In Answer to Appellants' Point I, R. 289.)

In considering appellants' contention that the act compels them to dedicate their property to the quasi public use before they can operate as contract carriers, it is important to fix with definiteness the limitations which have been thrown around the exercise of

the power conferred upon the State Commission and to determine just what persons are subject to its provisions.

In the first place, it is made entirely clear by Section 6(*a*) that the Commission's supervision extends only to those who make a business of hauling for hire over the public highways (R. 17). It is only the contract carrier who uses public property as a place for making a living who is subject to its terms.

The act was so construed by the trial court (R. 140-141):

> "In the same way we notice the argument of the intervener Beard that the Act is unreasonably restrictive because its effect is to prohibit the casual use of roads by individuals who, not in the general business of carriage for hire, but as mere agents for another, casually haul making a charge therefor.
>
> "In our opinion the Act does not admit of such interpretation. We think it is directed at and reaches only those persons who, as complainants and interveners, do make their living off of carriage on the roads. Besides, none of those in this case are casual carriers; they are all in it as a business. In fact there is more than a little question as to whether though the particular work they are now doing may be under private contract, they are not really common carriers since they in fact hold themselves out for all the work which they may get to do. Certainly none of them is a casual carrier or in a position to complain on behalf of such carrier of hardships which the law may have imposed upon him."

That this view of its meaning answers the argument that it is unreasonably restrictive needs little demonstration. The merely casual or incidental haul for hire which persons in their ordinary demands might make on the highways is unaffected by the act. This would be true, for example, in case a farmer desired to pay his neighbor on the adjoining farm for hauling a load of cotton or wheat to market, or if a man in the city wished to compensate his neighbor for moving his furniture. Under this act the casual, incidental and isolated hauls for hire will continue to enjoy the ordinary use of the public highways.

Even when one is engaged in the business of hauling for hire, he is not subject to regulation unless his operations are of sufficient magnitude to extend between two or more incorporated cities, towns or villages; nor do its provisions apply to vehicles operated exclusively within the corporate limits of cities and towns (Sec. 1(*g*), R. 13). Thus the act imposes no burdens upon that class of carriers operating on short hauls between points of origin and common carrier stations, or on those who are making only ordinary and limited uses of the highways. *Sproles v. Binford,* 286 U. S. 374.

In brief, one operating as a contract carrier is not subject to regulation under the terms of the act unless: (*a*) He is engaged in the business of hauling for hire over the highways, and (*b*) his operations extend between two or more incorporated cities, towns or villages. In the absence of either of these conditions he is free to operate without hindrance of this law.

Finally, the Commission is not authorized to regulate the rates and service of contract carriers who do not operate in competition with common carriers (Sec. 6*aa*, R. 19).

It is plainly apparent from all this that the Legislature was aiming not at the limited and ordinary use of the highways which the average citizen might be expected to make as an incident of his own business needs, but it was aiming at the extraordinary and extensive commercial uses which had developed along with improved roads. The classification is based upon the substantial differences between these uses.

Appellants are subject to the regulations of the act because they are engaged in the business of hauling for hire between two or more incorporated cities (Findings I to VII, R. 171-3). All other carriers making a similar use of the highways are subject to its terms. If they choose to do so they may limit their operations in such manner as to avoid regulation. They are not subject to the act because of the kind or number of vehicles they use, nor because of the particular commodities they haul, nor yet because of the amount of tonnage they carry, but simply and solely because they are making a regular and extensive use of the public highways as a place of business.

Having determined who are members of the legislative classification designated "contract carriers", and the conditions under which the Commission's regulatory powers may be exercised, we shall now answer the argument that the act requires them to dedicate their property to the quasi public use before so operating over the highways.

It should be borne in mind at all times that appellants and others similarly situated are carrying on a business for gain upon public property which is constructed and maintained at public expense. To this important extent, at least, their status as carriers is distinguishable from all others. In the case of railways, pipelines, and other public carriers the right-of-way is acquired and maintained at the carrier's own expense, and under the authority of a delegation by the State of its power of eminent domain. Motor carriers, however, are devoting to their own use and profit that which belongs to the public and without assuming the burdens of acquisition and maintenance, and under circumstances where the previous exercise of the power of eminent domain by the State inures as much to their benefit as it would have had they exercised it for themselves..

Perhaps these facts form the principal basis for the almost universal rule that the use of public highways by carriers of property for hire is an extraordinary use which is enjoyed as a mere privilege or license and which is revocable at the will of the Legislature.

This doctrine was approved by the Supreme Court of Texas in the recent case of *Ex parte W. W. Sterling et al.*, No. 6322, decided October 1, 1932, not yet officially reported. The opinion adopted by the court used this language:

> "The law making body of this state may, if it considers it in the public interest, withhold altogether the use of public highways from the operation of trucks carrying freight for hire. The power to prohibit the use of the highways for

> such purposes necessarily includes the lesser power to place such restrictions and regulations upon the use thereof as may be deemed proper, even though the burdens imposed may be of such a nature as to prevent any profitable operation upon the part of those desiring to pursue such business. Of course, where the legislature grants the right to the use of the highways for the carrying of freight it cannot unreasonably and unfairly discriminate in favor of or against any particular person or class of persons. *Smith v. Cahoon*, 283 U. S. 553; *Sproles v. Binford*, 286 U. S. 374. In our opinion the act in question is, as was held by the Supreme Court of the United States in the Sproles case, free from any such discriminatory provisions."

This pronouncement by the highest court of Texas is in complete harmony with the rules which have been approved by this Court. *Buck v. Kuykendall*, 267 U. S. 314; *Packard v. Banton*, 264 U. S. 140; *Michigan v. Duke*, 266 U. S. 571; *Frost v. Commission*, 271 U. S. 583.

Since appellants and others of their class in making this extraordinary use of the highways do so at the sufferance of the State and not as a matter of right, we pass to a consideration of the conditions which have been affixed to that use.

In the first place contract carriers are not declared to be common carriers, nor are they required to become so in fact. Both are left by the definitions contained in the act exactly where they are by the decisions of the courts. This is made clear by the definition contained in Section 1(*h*) (R. 13). A contract carrier is defined

as a motor carrier operating "other than as a common carrier." Stated in another way, the common carrier provisions of the act can only be imposed upon common carriers as that term is defined by the decisions. The same is true of contract carriers.

The act then imposes distinctly different schemes of regulation upon common and contract carriers. It neither undertakes by legislative fiat to convert contract carriers into common carriers as was done in *Michigan v. Duke*, 266 U. S. 571; nor does it unlawfully condition the use which contract carriers may enjoy which was the vice pointed out in *Frost v. Commission*, 271 U. S. 583. It does not undertake to exclude altogether as was the case in *Buck v. Kuykendall*, 267 U. S. 314; and there are no discriminations as between commodities hauled or lack of differentiation between the two classes as was the case in *Smith v. Cahoon*, 283 U. S. 553.

In support of this classification the court below made the following findings:

> "We find that the Legislature has not undertaken to convert private carriers into common carriers, nor upon the pretext of regulating highways to impose arbitrary restrictions upon the business of those who use them. What it has done has been to put into effect the Legislative policy, which it has declared should be adopted, that the business of carrying for hire on the public roads is a business affected with the public interest which may be enjoyed only under Legislative grant" (R. 178, Finding XXX).

> "That it has fixed the condition of such grant in clear and plain language and that any person desiring to operate a business on the roads may obtain a franchise according to his desires" (R. 178, Finding XXXI).

It's conclusions of law further support this view of the act:

> "That the Legislature has not undertaken to convert private carriers into common carriers by any kind of fiat, and it has not imposed arbitrary restrictions upon the business of persons using the highways" (R. 179, Conclusion III).
>
> "That it merely has done what it has a right to do, asserted its will as to the conditions under which persons who use the public roads in the conduct of their business may obtain a franchise to use them, and that the exercise of such powers has not, in any manner, transgressed the Fourteenth Amendment" (R. 179, Conclusion IV).

A detailed consideration of the act will demonstrate that contract carriers are left entirely free to regulate their schedules, designate their territory and their routes, select their contracts, and the commodities they choose to haul. They are under no burden or duty of accepting any commodity which they have not contracted to haul. They are not required to accept or transport the freight of any shipper. In other words, by complying with the reasonable and non-discriminatory conditions fixed by the act they may freely elect the character of business in which they wish to engage and obtain permits or franchises to use the public highways for that purpose.

There is nothing in the act which requires a contract operator to put his property to a new or different use than that to which he has voluntarily devoted it. There is no requirement that he perform a greater service than he has contracted to render. Here there is no taking of property devoted to one use and declaring it devoted to another and a different use; no creation and regulation of a new use. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; *Cotting v. Kansas*, 183 U. S. 79; *German Alliance Insurance Company v. Lewis*, 233 U. S. 389.

The chief, if indeed it is not the whole complaint which is made against the act is that it authorizes the Commission to refuse a permit if it be of the opinion that the proposed operation will impair the efficient public service of any authorized common carrier then adequately serving the same territory (Sec. 6(*c*), R. 18); and when they are operating in competition with common carriers, that the act authorizes the Commission to fix minimum rates not less than those prescribed for common carriers for substantially the same service, and authorizes it to prescribe rules and regulations for their government (Sec. 6*aa*, R. 19).

Appellants erroneously state at pages 2 and 3 and under Points II and III of their brief that the act authorizes the Commission to fix both maximum and minimum rates for contract carriers. This error results from their failure to give proper consideration to the specific provisions which control the general provisions of the Act. Section 4(*a*) (R. 14) vests the Commission with general power to prescribe maximum

or minimum or maximum and minimum rates for motor carriers. Motor carriers are defined by Section 1(*g*) (R. 13) to include both common and contract carriers. However this general power to fix rates is limited by the language of Section 4(*a*) with the statement that it shall be exercised "in accordance with the specific provisions" contained in the act. The specific provision relating to the Commission's power to fix contract carrier rates is contained in Section 6*aa* (R. 19). It authorizes the Commission to fix minimum rates only. That the Commission is authorized to fix minimum rates only for contract carriers is made certain when the penalty provisions of the Act are considered. It is made a misdemeanor by Section 16 (*i*) (R. 29) for a contract carrier to charge a lesser rate than that fixed by the Commission, but not for charging a greater rate. These provisions clearly show that the Commission's power is limited to that of fixing minimum rates only for contract carriers.

The Texas Commission has so construed the Act (R. 204). Appellants have so construed the Act by the allegations contained in their bills of complaint (R. 37).

We again call the Court's attention to the fact that the Commission's power to fix minimum rates may not be exercised unless contract carriers are operating in competition with common carriers (Sec. 6*aa*, R. 19).

Clearly these provisions do not require appellants to devote their property to any new or different use, but merely regulate the use already made of the highways. The Commission's authority to refuse a permit under the conditions named is based, in part, upon the

State's undoubted power to protect its highways and to relieve them of hazards and congestion, and in part upon its power, as well as its duty, to foster and preserve a safe and dependable transportation system for the whole people. Its power to prescribe minimum rates is not only essential for the latter reason but, additionally, to prevent the destructive competition, discrimination and irresponsible practices which have so greatly injured common carrier service in the State, as well as individuals, communities, and the business structure generally. That these uses of the highways have had these effects will be fully shown under our Point II.

The other regulations requiring the keeping of accounts and making of reports, as well as the penalties prescribed for rebates and discriminations are essential to the effective enforcement of the act. Without these provisions the great purposes of the act would be entirely defeated.

Section 13 of the Act (R. 24-25) which requires motor carriers, common and contract, to carry insurance for the protection of the public has been construed by the Texas Commission to require contract carriers to carry cargo insurance for the protection of the shippers for whom they transport property. This section has not been construed by any of the state Courts. It is open to the construction that its requirements for cargo insurance do not apply to contract carriers. If it be construed as requiring cargo insurance for contract carriers it should be remembered that in this case, as distinguished from the

Frost and Cahoon cases, we have shown that contract carriers are engaged in a business which is affected with a public interest. If contract carriers are engaged in a business which is affected with a public interest the requirement for cargo insurance becomes a reasonable and valid regulation for the protection of the general public.

In connection with this requirement it should be remembered that many, if not most hauling contracts are oral and are entered into with the mere formality of tendering the freight and agreeing upon a rate (R. 198). We have shown that contract carriers taken collectively and as a class are in the business of hauling for hire the property of the general shipping public. In passing on the validity of this act, and this particular requirement, it would be a narrow view to take that the inquiry must be restricted to the particular arrangements between carrier and shipper at a given time. The real problem cannot be appreciated unless a course of dealing covering a reasonable period of time is considered.

That the trial court approached the problem from that viewpoint is shown by the following findings:

> "The complainant, J. H. Stephenson and the complainant-interveners, W. S. Finnegan, P. E. Arnett, D. A. Beard, V. C. Bilbo, B. E. Ites, J. T. Carroll and A. S. Robinson, are each engaged in the business of transporting property for hire by motor trucks over the highways of the State of Texas as contract carriers, but, though the particular work they are now doing is under private contract with one customer, motor car-

ries of this character, as a business, usually and at their own option, transport selected commodities for different customers between numerous points from time to time; that, though any one operator is a private carrier, the combined results of the numerous contract carrier operations, including complainant and complainant-interveners and others similarly situated, adding together the carriers and their contracts, constitute a transportation which, in its sum total, includes every character of carriage which is performed by common carriers." (R. 172-173, Finding VII).

"The number of contract carriers on the highways of Texas having rapidly grown, as elsewhere found, the business they conduct now exists as a very large factor in commercial transportation. The court finds that it is not the effect of one such carrier or a limited number thereof which produced the serious problem with which the Legislature of Texas purported to deal and has dealt, but it is the effect, in the aggregate, of such contract carriers that is important." (R. 176, Finding XXII.)

When viewed in this light the requirement for cargo insurance does not appear to be unreasonable. On the contrary the shipping public, under modern conditions, is so much dependent upon contract carriage, which, in its sum total, as stated, includes every character of carriage, that such protection is now essential to preserve its interests.

We believe, therefore, the act is not subject to the objection that it requires appellants and others of their class to devote their property to any different or

greater public use than that to which they have devoted it themselves; that the conditions imposed upon contract carrier operations are reasonable and necessary in the public interest and appellants first proposition is therefore without merit.

II.

The class of contract carriers who are reached by the act are, under the conditions now obtaining on the highways, engaged in a business which is affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest. (In Answer to Appellants' Point II, R. 289-290.)

Consideration of this proposition necessarily begins with the leading case of *Munn v. Illinois*, 94 U. S. 113. That case "introduced into American constitutional jurisprudence the doctrine that an industry or occupation, not in itself public in nature, may become such in fact and substantially in law by reason of the position of importance and indispensableness it comes to occupy in the economic and industrial life of the people; in other words, that it thereby becomes 'affected with a public interest' and subject to the same power and modes of State regulation as are allowable in cases of industries essentially public in nature." *Willoughby on Constitution of United States*, Vol. 3, Sec. 1157, page 1749.

We merely wish to emphasize the fact that the Munn case dealt with a business which had grown to such importance and the manner of its operation was such

that it affected the economic and industrial life of the people and that it was thereby affected with a public interest for those reasons. The act here under consideration deals with a business which, within the past five or six years, has grown to such proportions and is conducted in such manner that it seriously affects the economic and industrial life of the State.

Since the Munn doctrine was pronounced, it has been modified and extended by many subsequent decisions of this Court. Many industries and businesses over the years, some new and some old ones, have by developing a new or peculiar relationship to the public brought themselves within the field of regulation.

The erroneous notion that this regulatory power is limited to cases where the owners of property enjoy a virtual monopoly in their business was corrected in *People v. Budd*, 117 N. Y. 1, affirmed in *Budd v. New York*, 143 U. S. 517. That case extended the regulatory power of the State to businesses which hold such a peculiar relationship to the public interest that such power is superimposed upon them.

In *Brass v. North Dakota*, 153 U. S. 391, this Court sustained a statute regulating rates for grain elevators. Mr. Justice Brewer pointed out in a dissenting opinion that along a single railway line within that state there were six hundred elevators operated by over 125 persons and varying in cost from $500 to $5,000 and that any person could, at a cost of less than $200, provide himself with storage facilities. In this connection he stated:

> "Property used in handling and storing the great staple articles of food and the necessaries

> of life, by which use a tax or toll is levied thereon, ceases while applied to such use to be *juris privati* only and becomes affected with a public interest, and such use may be regulated by the legislature without encroaching upon any of the constitutional rights of the owner."

While those cases show that the element of monopoly or special governmental privilege is not essential, it is not entirely lacking in the operation of this law. It limits the number of permits or franchises which may be issued and prohibits others from so operating over the highways. Thus the governmental privilege which is granted is of much greater value to the holder and in some measure approximates the nature of a monopoly.

Attention is also directed to the close analogy existing between the situation of motor carriers for hire making only a permissive use of public property, and that of other carriers and businesses acquiring rights of way and places of business abode by virtue of the delegated power of eminent domain. The courts have generally adhered to the notion that the delegation of this prerogative of sovereignty, accompanied by the exercise of privileges under it, gives rise to certain obligations of a public nature and within itself opens the door to public regulation of such businesses. It is difficult to perceive any substantial difference in their situations. One acquires his own right of way and pays for it. Motor carriers do neither but operate under franchise over public thoroughfares. If there is a difference, it appears the motor carrier has the better bargain; that he has been granted greater privi-

leges and, therefore, is under greater obligations to the public. If this be true, it does on that basis invest his business with a public interest and entitle the public to the regulate it in its interest.

Carrying that reasoning further, has not the contract carrier, in exercising the privilege of such a use of public highways, voluntarily dedicated his property to a public use? We think so, and that he should not be heard to complain of a reasonable regulation of it.

Of course the question whether a business has been rendered subject to regulation because affected with a public interest is ultimately a judicial one, depending upon its nature and the circumstances under which it is conducted. The right to regulate private property has usually been sustained on the theory that the public has acquired an interest in it because of the nature and character of the business, and further, because the owner has devoted it to a public use which is consistent with that public interest. This much was determined by the Munn case.

When the owner devotes his property to a use in which the public has an interest, he thereby grants the public an interest in that use and must submit to regulation for the common good, at least to the extent of the interest he has created. *Charlestown Natural Gas Company v. Lowe,* (W. Va.) 44 S. E. 413; *People v. Budd* (N. Y.) 22 N. E. 676, affirmed in *Budd v. New York,* 143 U. S. 547.

The Court's comment in *German Alliance Insurance Company v. Lewis,* 233 U. S. 289, is peculiarly applicable to the instant case. The act there under consideration dealt with the regulation of a business based

upon contracts of insurance which had theretofore been considered private in nature. The court pointed out that fire insurance had, for some time, been regarded by the states as a business requiring more or less special police and other regulation. The court very pointedly remarked that "a conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse." It went on to say that a large part of the country's wealth is protected by insurance and that this fact demonstrated the public interest in it.

Of special significance in that case were the court's statements that "contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the inidvidual," and the further statement that:

> "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world, to pursue which a greater liberty may be asserted. * * * The contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly."

The striking parallel between that situation and the one here is too obvious for comment. May we simply remind the Court that the demand for effective control of contract carriers is almost universal, as witness its own decisions and those of the numerous inferior courts of the land. May we say also that the per-

sistence of this demand saves it from the charge of unconsidered impulse, and stamps it with the verity of vital public need.

In like manner may we add that the millions of hauling contracts executed on public highways are interdependent from the public viewpoint and cannot be regarded singly or isolatedly.

In the recent case of *Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522, the State undertook to fix wages in establishments for the manufacture of food and clothing or for the production of fuel or its transportation. While the court held the act unconstitutional, it threw additional light upon this subject in its analysis of the industries which are affected with a public interest. Among others this Court recognized as an important class, subject to regulation, those industries which, though not public at their inception, may be fairly said to have risen to be such. Concerning this class the Court said:

> "They have come to hold such a peculiar relationship to the public that it is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly."

That case discussed another class which includes those industries carried on under the authority of a public grant of privileges which, accompanied by the exercise of those privileges, gives rise to certain obli-

gations of a public nature and opens the door to public regulation. This case, it will be observed, combines the elements contained in both the first and third classifications which were noted in the *Wolff Packing Company* case.

We have already shown that the act does not apply to the casual or incidental contract haulers but only to that class of contractors who, by reason of their regular and continuous use of the public highways as a place of business, have created the perplexing problems which the act seeks to solve. Specific attention will now be given to these problems and to the effects these uses have had on the various interests of the State in the light of the authorities we have discussed.

(*a*) *The Extent and Nature of the Business of Appellants.*

Appellants represent the court below as finding that each of appellants is "operating one, or some few, trucks under one contract with one owner of goods." Appellants further state that their status "as small private contract carriers is in no way assailed" and that their character as such is sustained by the record in this case.

An examination of the court's finding VII (R. 172) reveals that contrary to appellants' statement the court did not find that each of appellants was "operating one, or some few, trucks under one contract with one owner of goods." But in fact the court found that "the particular work they are now doing is under private contract with one customer." The court made no finding whatever with reference to the number of

trucks appellants were operating; to the number of owners of goods transported by them, and made no finding with reference to the manner or extensiveness of the transportation services performed by appellants. On the contrary, in the very finding to which appellants refer, the court found that: "Motor carriers of this character, as a business, usually and at their own option, transport selected commodities for different customers between numerous points from time to time; that, though any one operator is a private carrier, the combined results of the numerous contract carrier operations, including complainant and complainant-interveners and others similarly situated, adding together the carriers and their contracts, constitute a transportation which, in its sum total, includes every character of carriage which is performed by common carriers."

Appellants' statement that their status "as small private contract carriers is in no way assailed" is not supported by any finding of the court or by any fact contained in the record of this cause. On the contrary the record shows that appellants make an extensive use of the public highways as a place to conduct their business.

We submit the following concise statement of the nature and extent of the operations of appellants:

Complainant J. H. Stephenson:

(1) Operates three trucks valued at $15,000 (R. 209).

(2) Contract with Southwest Freight Company, Inc. Also referred to as Southwestern Freight Company, Inc. (R. 210).

(3) Hauls between Houston and San Antonio, Texas. Approximately 200 miles (R. 208).

(4) Southwest or Southwestern Freight Company, Inc., is a forwarding company collecting into shipping lots the freight shipments of the general public (R. 171).

(5) Transported many carloads of freight over the highways between Houston and San Antonio, Texas (R. 209).

(6) Will earn net profit under his contract of $10,000 per annum (R. 210).

Intervener W. S. Finnegan:

(1) Motor truck equipment valued at $4,000 (R. 217).

(2) Contract with West Texas Motor Freight Lines, a common carrier by motor truck hauling traffic for the general public (R. 215).

(3) Hauls between Houston, Texas, on the one hand and Dallas, San Benito, Brownsville and McAllen, Texas, on the other hand (R. 171). The territory covered traverses approximately 500 miles of highways.

(4) Will earn, from the transportation of property over the highways of Texas, a net profit of $3,500 under the terms of his contract (R. 217).

Intervener P. E. Arnett:

(1) Motor truck equipment valued at $6,000 (R. 217).

(2) Contract with Linde Air Products of Texas, a manufacturer of gas products shipped in cylinders (R. 216).

(3) Hauls between Houston, Texas, and all points in the State, principally between Houston

and Beaumont and Port Arthur (R. 216). The territory covered traverses the entire highway system of the State.

(5) Will earn net profit, from the transportation of property over the highways of the State, of $6,000 per annum under the terms of contract (R. 217).

Intervener D. A. Beard:

(1) Motor truck equipment valued at $18,000 (R. 199).

(2) Contract with Peden Company, a jobber and distributor of hardware and iron and steel articles (R. 198).

(3) Hauls between Houston, Texas, and all points generally throughout the State (R. 198). Territory covered traverses the entire highway system of the State.

(4) Handled about ⅓ of all commodities shipped by Peden Company and earned gross revenue of $15,000 in period of approximately four and a half months (R. 198).

(5) This intervener appeared before this Court in the case of *Binford v. McLeaish*, No. 391, October Term, 1931. That case involved only motor carriers transporting cotton over the highways. Beard there swore that:

"During the past cotton season I transported, for various persons, approximately 75,000 bales of cotton to Houston and Galveston, 46,000 bales for one firm to Galveston, the balance for various firms to Houston. I made a private contract for each load or shipment, the charge of transportation differing with the locality, condition of the roads, weather, and the bar-

> gaining power or shrewdness of the individual owner." (Page 180 of Binford *v.* McLeaish record.)

Again in that case, at page 181, the same D. A. Beard swore that:

> "I have hauled lumber, dry goods, roofing material and other articles."

The period of time involved in the sworn statements of Beard in cause number 391, October Term, 1931, relates to substantially the same period of time covered by his sworn statements in the instant case.

Intervener V. C. Bilbo:

> (1) Operates 18 motor trucks (R. 213).
>
> (2) Has contract with the Great Atlantic and Pacific Tea Company (R. 212).
>
> (3) Hauls from Dallas warehouse of Tea Company to their branch stores and covers territory within 230 miles radius of Dallas (R. 213). This covers a substantial portion of Texas and parts of Oklahoma, Arkansas and Louisiana.
>
> (4) Transportation includes merchandise, supplies and commodities of every kind and character. Volume not shown of record (R. 213).

Intervener J. T. Carroll:

> (1) Operates 23 motor trucks (R. 213).
>
> (2), (3) and (4) Substantially the same as intervener Bilbo (R. 213).

Intervener A. S. Robinson:

(1) Operates 2 motor trucks (R. 213).

(2), (3) and (4) Substantially the same as intervener Bilbo (R. 213).

Intervener B. E. Ites:

(1) Operates 2 motor trucks (R. 220), valued at $3,000 (R. 220).

(2) Contract with Herrin Transfer & Warehouse Company of Houston, Texas (R. 220). Herrin is forwarding company operating similar business to that of Southwest Freight Company.

(3) Hauls between Houston, Texas, and all points in the State (R. 146). Operations traverse all important highways of the State.

(4) Gross income from transportation over highways approximately $400 per month as a result of contract (R. 221).

(*b*) *Their Public Profession and the Extent of Their Operations.*

The undisputed facts of record show that appellants and contract carriers generally perform every character of carriage usually performed by common carriers (Finding VII, R. 172-173).

The making of numerous contracts from time to time is characteristic of the class. Appellees' witness, Robert Mayer, cotton exporter, on this point testified (R. 227):

"These so-called contract carriers do make contracts between themselves and one shipper, but also said motor truck carriers will make the

> same character of contract with any and all shippers having cotton or other commodities for transportation to the ports. While it is true that any one individual contract may be a contract between the motor carrier and one shipper or owner of the cotton, it is also true that as soon as the performance of that particular contract is completed, a motor truck carrier will, and invariably does, offer to handle cotton for other shippers under the same arrangement."

The witness, C. E. Hinds, traffic manager for Butler Brothers, a wholesale merchandising concern of national scope, testified:

> "Contract motor truck carriers generally hold themselves out to make a contract with anybody offering any quantity of freight. * * * These so-called motor truck contract carriers are in fact engaging in a general transportation business. * * *" (R. 271).

Appellants and each of them transport various commodities from their home terminals to practically every important city in Texas. Their routes extend in each instance for hundreds of miles and they use practically every improved highway in the State in performing their contracts (Findings I to VII, R. 171-173).

These facts, which are not contradicted, show the real character of appellants' businesses and demonstrate that they are "public carriers", in fact. They also show that if the Commission is required to judge their character at any given time and on the contracts

then held, it will be impossible to solve the great problem their operations have presented. They show, too, that none of the appellants are casual or ordinary haulers but engage in extensive state-wide transportation services.

(*c*) *Kinds of Traffic Hauled.*

The court found it to be the universal practice of contract carriers to select particular shipments, and desirable traffic, and that this served to produce discriminations between commodities, shippers and communities (Finding IX, R. 173).

The witness C. V. Terrell, Chairman of the Railroad Commission of Texas, testified (R. 244) that contract carriers were taking "the cream of business." He stated it was a common practice for them to "solicit and take that business which it is convenient for them to handle" and that they "underbid the common carriers for such business, thus thwarting the purpose of the regulatory laws".

Appellees' witness, A. J. Stone, testified (R. 223) that freight charges for railroads

> " * * * are so designed as to give to the public a general scheme of rates which would permit all kinds of commodities to move in commerce, such as low grade commodities like sand, gravel and coal and high grade commodities like dry goods and automobile tires. The value of the commodity and its ability to stand transportation charges, plays an important factor in the amount of the freight rates exacted for the transportation service. It is my judgment that

through no other method can the low grade commodities, such as sand and gravel, coal, grain and farm products in general et cetera, be permitted to move in commerce at rates which that character of traffic could reasonably bear and be absorbed by the consuming public.

"Unquestionably, if the transportation by the railroads of high grade commodities and the revenues they receive for such service are to be demoralized by improperly regulated and cutthroat competition, and thereby are deprived of the high grade traffic which, taken together with all other traffic, affords the rail carriers an adequate revenue, but are forced to continue to transport low grade commodities, one result is inevitable, namely, that the railroads will be forced to raise the rates on the transportation of all low grade commodities.[5]

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[5] "Since in general the railroads cannot reduce their expenses and overhead costs in proportion to declines in volume of business done, either the traffic remaining after diversions have occurred will have to pay increased rates or the railroads will fail to earn a fair return. Where railroad property has been rendered obsolescent, it becomes necessary to determine how far the public shares the responsibility and what part, if any, of the cost of carrying such property in the future should be borne by rate payers. Where, however, there is simply a reduction in volume of business, there are increased unit costs which the railroads must shift to the public if the return on such property is to be kept at a level recognized to be essential. Those who must use the railroads—and these would be essentially long distance shippers and shippers of low-grade commodities—face an increase of their rate burdens. Shippers

"This result, in my opinion, is inevitable, and will unquestionably deprive the low grade commodities of an opportunity to move to consuming markets". (R. 224).

The witness then showed that the average per ton revenue for railroads for all traffic was $2.02, while the average for trucks was $8.56 per ton (R. 224).

He further showed that 65 per cent of railway revenue is derived from high grade traffic and only 35 per cent comes from the low grade heavy traffic (R. 224).

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will endeavor to escape the effects of increased rates, thus giving added incentive to territorial decentralization of production. Such decentralization in turn adds to the railroads' competitive difficulties and may set forces in motion which they will find increasingly difficult". 182 I. C. C. 365.

The traffic paying the greater revenue has been lost to the trucks. Railroads furnish a year-around and dependable service and are prepared to handle peak loads of traffic and go to great expense to have cars ready to take care of this traffic. "While the diversion of any traffic may mean severe loss, especially where the traffic yields more than average returns, diversion becomes especially serious where trucks take a large part of the traffic, leaving the railroads to prepare for the peak business as well as to care for the lower volume of year-around business. This condition is most true of agricultural commodities, especially perishable, whose movement is characterized by a high seasonal peak. * * * In these instances the trucks are mainly of the contract or wildcat type and are able to shift about as opportunities offer. The effects of this kind of competition must be dealt with as one of the costs of having two forms of transportation where one would be adequate". 182 I. C. C. 364-5.

He further testified that the Class I railroads in the State carried 89,920,743 tons of freight in 1928, and that only 20.34 per cent of this traffic yielded a revenue of $5 per ton or greater, and stated (R. 224-225):

> "* * * the State of Texas is going to find itself face to face with the problem of the railroads left with eighty per cent of their traffic and thirty-seven per cent of their revenue. In other words, the freight revenue per ton of the railroads and the freight revenue per ton of the motor trucks indicate that the motor truck competition is capable of taking from the railroad common carriers sixty-three per cent of their revenue, but that the motor trucks are only capable of handling twenty per cent of the tonnage, thus leaving for the railroads eighty per cent of the tonnage, with only thirty-seven per cent of the revenue. In my judgment, it is obviously impossible for the railroads to perform eighty per cent of their transportation service upon the basis of thirty-seven per cent of their present revenue. Either one or two things must happen. The freight rates on low grade commodities must be increased, or the railroads will be forced into bankruptcy. In my judgment, many of the low grade commodities cannot be moved into the consuming market upon increased charges. And, furthermore, if the charges were increased to any great extent, there would be a further shift of the traffic to the highways. It is my opinion that the State must, in order to maintain adequate transportation facilities for the public, regulate the rates and charges of the so-called contract carriers,

> by motor trucks. By no other method can the State provide an adequate transportation system for the commerce of the State of Texas".[6]

These facts clearly show the public interest which is involved in the operations of all motor carriers, contract or common, and indicate the necessity for regulation.

(*d*) *Effect on Railways.*

With respect to competition between contract carriers and railways, the court found as follows:

> "We find that there are 16,890 miles of railway lines in Texas representing a property investment of over nine hundred million dollars. That while this system of railways has been developed in order to meet the transportation needs of the State, a large part of such facilities lie idle and unused due, in some measure at least, to the competition of motor truck transportation; that in nearly all instances railway lines are paralleled by one or more competing common carrier truck lines operating over public highways; that many other points in Texas not reached by railways are served by common carrier motor truck lines." (Finding VIII, R. 173).

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[6] "No plan of rate regulation which does not include within its provisions the contract carrier is thought feasible. * * * Participation of railroad and water lines on an equal basis with independent operators in the transportation of freight by motor truck is desirable". 182 I. C. C. 377.

It further found that contract operations had disrupted railway transportation; that this act and the regulation of rates and service will serve to stabilize railway transportation; that trucks cannot adequately serve the State's transportation needs and that, therefore, the regulations of the act are necessary in order to conserve and maintain an adequate transportation system capable of serving the entire needs of the people; that all available carriage service including that by rail and road are so inter-dependent "that the public may not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers". (Findings VIII, IX, X, XI, XII, and XXV, R. 173-174).

The testimony of record fully supports these findings. Governor Moody, in a message to the Legislature which enacted this law, stated (R. 242):

> "If busses and trucks are operated over routes parallel to existing lines of railway, and in competition with them, it seems evident that under the policy of the Federal Government, as declared in Transportation Act of 1920, that the people will ultimately be called upon to pay higher rates on commodities which must move by rail, and that the same may exceed the public saving accomplished by cheaper bus and truck rates. Motor vehicles are here to stay as a means of commercial transportation, and should stay, but thought should be given to placing motor vehicle transportation in the field which

> will be of the greatest economic value to the whole people. If trucks and busses are to operate in competition with railroads, and at considerable damage to highway development; and if, because of the reduced business of the railroads the public is made to pay higher railroad rates on commodities moving by rail, it is hardly possible that under such conditions the truck and bus transportation could be economically profitable to the general public".

F. I. Cairns, Special Statistician for the Texas and New Orleans Railroad Company made an exhaustive analysis of the effect of motor transportation upon railways in Texas. His testimony is reported at pages 272 to 284 of the record. The exhibits upon which his conclusions are based were too voluminous to print in the record and are brought to this Court as an original exhibit.

He testified that railway lines honeycomb the State and that there is scarcely a conceivable movement of traffic which cannot be handled by rail. He said:

> "That during the past few years heavy quantities of tonnage have been diverted from them to other transportation agencies. That, as a consequence, a large part of their facilities lie idle and unused and that, despite the strongest transportation economies and a tremendous increase in efficiency of operation their ability to continue to render adequate and dependable service is greatly threatened. They are capable at this time of rendering more efficient public service than at any time in the past." (R. 273-274).

The witness called attention to the keen competition existing between trucks and railways and showed that truck operations were conducted in the same territory with and parallel to railway lines and with the result of a wasteful and unnecessarily duplicated service.[7] (R. 274-275).

The study made covers the period from 1921 to 1931 and includes, as stated by the witness, the depression year of 1921. That year, and the years following, therefore, may fairly be compared with the figures for 1930 and 1931 (R. 276).

Freight revenue per mile of road was $11,156 in 1921. This figure rose to $12,725 in 1927. It dropped in 1930 and was only $7,081 in 1931, or only 63 per cent of the 1921 figure and only 55 per cent of the 1927 figure (R. 276).

In 1921 railways earned $2.97 per ton per mile. In 1931 this figure dropped to $2.37 per ton mile, or only 77 per cent of the 1921 figure (R. 276).

These losses in revenue have been sustained notwithstanding railways have made sweeping reductions in operating expenses. Operation costs were $11,300 per mile in 1921, while they were only $6,758 per mile in 1931, or only 60 per cent of the 1921 figure (R. 277).

The witness further testified (R. 277):

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[7] Improved highways and larger and better equipment have increased the zones within which commodities can be trucked in competition with rail transportation. Some of these hauls extend for distances greater than 1,400 miles. 182 I. C. C. 292.

> "Collectively they indicate that the rail carriers now possess, by reason of the heavy increase in their investment, a transportation plant capable of rendering a greater service than ever before. While this is true, the last few years have witnessed a material decline in their tonnage and revenues. Their present low rate of return is in many instances insufficient to take care of interest on bonds, and other non-operating expenses."

The competition of trucks has been most severely felt in connection with less than carload traffic, although they have made material inroads in carload tonnage. In 1930 a typical Class I railroad originated only 40 per cent of its 1921 figure for less than carload traffic, and only 22.6 per cent of its 1923 total (R. 278).

In carload traffic for example,[8] during the four-year period from 1927 to 1930 railways lost to trucks 1,000,000 tons of cotton; 500,000 tons of cake and meal, 900,000 tons of animals and animal products, and 14,000 tons of canned goods. In this same period they lost 300,000 tons of less than carload freight. Other kinds of carload and less than carload traffic have been similarly diverted[9] (R. 279).

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[8] "The truck has made important inroads into the carload traffic of the railroads. It is steadily increasing its penetration into the field of carload traffic * * * ." 182 I. C. C. 285-6.

[9] "Other commodities which customarily have moved by rail in carload lots, and of which there is extensive diversion, includes sugar, sugar beets, rice, canned goods, automobile tires and accessories, building ma-

A good example of the effect of truck competition on railways is shown in the movement of cotton. In 1927 more than 95 per cent of the 5,000,000 bales of cotton received by the Texas ports was carried by rail. In 1931 only 57 per cent of the cotton was carried by rail to the ports. Trucks carried only 249,296 bales of cotton in 1927, while in 1931 they carried 1,475,942 bales over the highways to the Texas ports, representing a 488 per cent increase. Practically all of this cotton was transported by contract carrier trucks and resulted in very serious losses to the railways[10] (R. 280. See also testimony of S. G. Reed R. 250).

This heavy traffic diversion has seriously affected ever phase of railway operations. It has produced unemployment; jeopardized their financial position,[11]

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terials (brick, cement, stone and gravel), logs and lumber, furniture, paper, pulp board, foundry products, machinery (including heavy machinery requiring special truck equipment), paints and varnishes, beverages, baled hay and straw, leaf tobacco, fertilizer, and household goods." 182 I. C. C. 299.

[10] The railroads direct loss from August 1, 1930 to December 1, 1930 on cotton moving to the four Texas ports named above was estimated at $3,043,743." * * * 182 I. C. C. 294.

"The situation is rendered particularly grave by reason of the large dependence of many southern and southwestern railroads on movements of cotton and its derivatives." 182 I. C. C. 296.

[11] "Traffic diversions from Class I railroads have resulted, without allowing for expected increase, in a loss of gross passenger revenue of $274,000,000, comparing

seriously impaired their service, and otherwise adversely affected the public interest. This witness expresses the opinion that unless this diversion of traffic from railways to trucks is stopped, a great many of the railroads will be forced into bankruptcy[12] (R. 283-284).

The witness, A. J. Stone testified to the same effect (R. 223 to 225). A study of the testimony of these two witnesses will present a comprehensive picture of the serious nature of this phase of the problem in Texas.

(e) *Effect on Common Carrier Truck Lines.*

The Court found:

> "The inevitable result of the continuance of the enormous increase of so-called private carriers for hire and the continual decrease in the number of common carriers holding certificates of public convenience and necessity will be the practical disappearance altogether of common carriers from the roads." (Finding XXIV, R. 176.)

1929 with 1923, or of $418,000,000, camparing 1930 with 1923, and in a loss of gross freight revenue which also runs into the hundreds of millions, aside from the effects of rate reductions made to meet motor competition". 182 I. C. C. 321.

[12] "Many abandonments of short line railroads and of branch lines of large systems have occurred. Motor competition increasingly accounts for such abandonments. In the last five years nearly 75 per cent of all applications for certificates to abandon rail operations have mentioned motor competition as a factor." 182 I. C. C. 327.

This finding is based in part upon the testimony of Mark Marshall, Director of the Motor Transportation Division of the Texas Railroad Commission. He testified that under a prior act which did not give the Commission power to regulate rates of contract carriers that there was a constant decrease in the number of common carrier certificates issued by the Commission and a corresponding greater increase in the number of contract carrier permits issued.[13] For example, on December 31, 1929, there were 462 common carrier truck lines in the State while in August, 1931, there were only 364. In this same period contract carriers increased from 2,190 to 3,168. Of course the vast majority of hauling was done by trucks which were not under the supervision or regulation of the Commission under the prior act. The witness Marshall said:

> "The use of the highways for hire cannot be successfully supervised and regulated unless the Commission is empowered to fix minimum rates. One of the results of the enforcement of the former law was to materially reduce the number of common carrier trucks and greatly increase the number of private or contract carriers. This tendency was so marked during the past year or so that had the law remained in force, it is my opinion that the common carrier truck or Class A truck operator would have

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[13] "Contract carriers can seek out profitable lines of work and quickly abandon unprofitable ones, while certificate holders bear greater cost in providing service and also can not abandon their certificate without forfeiting the right to engage again in such operations." 182 I. C. C. 359.

been forced to surrender his Class A certificate and engage in private and contract carriage only. The contract or private carrier was not required to charge the rates fixed by the Commission for common carriers. The result was that there was a constant decrease in the rates charged by the private or contract carriers. This resulted in a material decrease in Class A revenue, more inefficient service on their part, and a general lowering of Class A standards. Ultimately, practically all of the property hauled over the highways of this State would have been carried by unregulated and unsupervised trucks. This would have brought about the same condition which existed prior to 1929, when regulation was first undertaken by the Commission. Our experience has shown that without proper regulation, the number of trucks hauling commodities would have greatly increased, adding to the congestion of the highways and endangering the safety of the traveling public to that extent. As I stated, the only way this condition can be corrected is in the manner provided by House Bill 335, which is now in force. If the Commission is empowered to fix a minimum rate for contract carriers, the confusion and chaos which existed prior to its effective date can be eliminated. The character of drivers will be raised, the number of trucks operating on the highways will be reduced, the traveling public and the property hauled on trucks will be indemnified against injury to the person and against loss or damage of cargo." (R. 246-247.)

C. V. Terrell, Chairman of the Railroad Commission, testified to the same effect (R. 244-245). He added, however:

> "* * * the experience the Commission has had in endeavoring to regulate highway transportation demonstrates that unregulated contract carriers as defined by the present law, effectually prevent the primary purpose of fostering and conserving for the general public welfare that commercial transportation on the highways which it has been the purpose of the laws of Texas and the rules of this Commission to foster and protect. The common carriers, who have seen fit to take out certificates of convenience and necessity under the laws of Texas heretofore have found the cream of business taken by Class B motor carriers, as defined by the former law, and contract carriers, as defined by the present law, who solicit and take that business which is convenient for them to handle and who underbid the common carriers for such business, thus thwarting the purpose of the regulatory laws mentioned.
>
> "If only the Class A motor carriers under the former law are regulated under the present law, and the Class B motor carriers under the former law, and the contract motor carriers, as defined by the present law, are not regulated as to their rates, the Class A motor carrier under the former law, and all other common carriers, as defined under the present law, will be so seriously affected by unfair competition that a chaotic state will exist to the great detriment of the public. The control of contract carrier service is so inextricably related to common carrier service that it is necessary to fix its rates and

> regulate its service in order to have an orderly and systematic transportation service which will not result in discrimination for or against any community or individual." (R. 244-245.)

The witness F. W. Ruby testified that he operates a common carrier truck line under a certificate of public convenience and necessity issued by the Railroad Commission of Texas. His rates and service are regulated. He has been operating for a number of years. Within recent years the number of contract carriers have greatly increased. Their rates and service cannot be met by common carrier trucks. If they are not regulated and controlled, his business will be destroyed and he will have to withdraw from the business of carriage as a common carrier (R. 225-226).

The witnesses D. C. Sanders (R. 227), H. P. Brown (R. 227), L. C. Abbott (R. 227), and M. S. Day (R. 227), each operate common carrier truck lines, and testified substantially to the same effect as the witness Ruby.

(f) Effect on Shippers, Commodities and Communities

It is here that the contract carrier has done the greatest injury. The court found that unregulated contract carriage produced discriminations and preferences as between commodities, shippers and communities.[14]

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[14] "Subject to no regulation in most jurisdictions, and limited regulation in others, contract carriers have a free hand in making their charges; they can make changes readily and can freely discriminate between

Its findings in this respect are as follows:

> "The Legislature, in effect, found that the lack of regulation of minimum rates of contract carriers operating at will over the highways selecting particular shipments and desirable traffic to handle served to produce discrimination and preferences as between communities, shippers and commodities, with a resulting disorganization, disruption and disturbance of transportation service not in the interest of the public, and we think the evidence not only does not overcome, but, on the contrary, supports this view." (Finding IX, R. 173.)
>
> "The Legislature, in effect, found that the regulation of the minimum rates to be charged by contract motor carriers for hire will serve to stabilize highway and railroad transportation and eliminate discriminations, preferences and rebates, and we find the evidence supports this view." (Finding X, R. 173.)

The witness Robert Mayer testified (R. 228) that contract carriers "have no uniform price as between different shippers. They discriminate in their rates

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shippers, types of traffic and communities. * * * Empty or partially filled trucks returning to their headquarters everywhere contribute to disorderly contract rates and indirectly to disorderly common carrier rates. * * * Where shipments are seasonal, as in the fruit and cotton industry, wildcat competition is a further disorganizing factor. Truckers of limited financial backing are sometimes driven to quoting extremely low rates to meet their immediate cash requirements." 182 I. C. C. 306.

and service as between shippers of the same commodity for identically the same service." The inability to know what charges will be made has made business so uncertain as to become an unprofitable undertaking.

With reference to these discriminatory practices the witness C. E. Hinds testified (R. 271):

> "In the past unregulated contract motor truck carriers have maintained no system of rates or no publications of any character which would inform their customers of the charges which would be made for a given quantity of transportation. Generally these rates have been made upon competitive basis as between the contract truck carriers and as between different lines of business. Different rates have been in the past frequently made by the same contract motor truck carriers for identically the same quantity and character of transportation service. This character of discrimination as between competitors has in the past demoralized business conditions and materially affected the ability of the distributors of commodities to compete with each other in a given consuming territory."

To the same effect Sam Hanna testified (R. 270):

> "The belief is shared by virtually all Texas wholesale grocers that should motor trucks be allowed to continue to operate without being regulated, chaos will result to the entire Texas jobbing and retail grocery trade, as well as other industries, for without regulation and no uniform cost of transportation, discrimination between jobbers and retailers is created, which

> discrimination extends to towns or communities, and ultimately to the consumer.
>
> "The stabilization of transportation costs will, in my opinion, result in stabilization of industry generally, and will permit those engaged in industries to establish the approximate cost of one of the principal factors of overhead expense."

These witnesses and others established that contract carriers have discriminated between commodities, shippers and communities, and that such discrimination is even practiced in cases where the conditions of operation and commodities hauled are identical.

(*g*) *Business Conditions.*

The Court found:

> "In its relation to business, unregulated and unstabilized transportation such as afforded by contract carriers on the highways of Texas, in the opinion of the Legislature of Texas as declared in the Act, is detrimental since commercial transportation, as a factor in business, should be reasonably stabilized and offered by all who compete in the same field upon substantially the same terms, and the court finds that the evidence supports this view." (Finding XXIII, R. 176.)

In the business of distributing general merchandise, transportation charges and practices are a material factor in determining the price paid by consumers. It is necessary to know the transportation charges in advance of the sale of commodities generally in order

to meet the competition of others engaged in the same line of business.[15] It is equally important that the transportation costs of competitive concerns be on a comparable basis.

The witness G. A. Trumbull, President of Huey-Phillips Hardware Company, testified (R. 264):

> "Since the development of truck transportation and prior to the regulation of the contract carriers our transportation costs varied almost from day to day and as a result, there was no established basis of these costs that could be laid down as a guide to enable us to determine the price at which we could sell our merchandise. Furthermore, it gave those engaged in the retail business an opportunity to take advantage of the wholesaler and manufacturer by stating that he could buy merchandise laid down at a cost less than that at which such manufacturer or wholesaler, under this arrangement for transportation, could charge, and the manufacturer and wholesaler were not in a position to contradict or call into question such assertion, for the reason that they knew that the transportation costs were dependent upon the individual whim of each truck operator. If transportation costs are regulated these difficult problems in the operation of our business

[15] "There are disadvantages in using trucks. Their inability to take all classes of traffic or traffic going to all distances makes it necessary for shippers to deal with both trucks and railroad. * * * Others mention the lack of a known basis of rates making it necessary to guess at what competitors are paying, and to indulge in bidding for rates, particularly those for back-haul movements." 182 I. C. C. 301.

will have been eliminated. We will be able to know, with a reasonable degree of certainty, our own transportation costs and those of our competitors and we can gauge the price of our merchandise accordingly. Furthermore, the retailer will not be in a position to put down the price of our merchandise by saying that he can purchase it elsewhere, and on account of a less cost of transportation, obtain such merchandise at a lower cost than the price at which we sell it.

"In other words, transportation costs are such an important element to the successful operation of a business that a slight variance will be the determining factor in the success of a business similar to the one of which I am president. The establishment of uniform and minimum rates upon the part of the carriers, whether common or contract, is essential to the stabilization of industry generally, and particularly, is it true of the industry in which I am engaged".

The witnesses H. B. Lockett (R. 257), Melrose Holmgreen (R. 259), J. E. Farrow (R. 260), E. V. Rhodes (R. 262), J. P. Everheart (R. 265), Ben E. Keith (R. 266), Ira Meredith (R. 267), E. C. Price (R. 267), A. J. Scrivener (R. 268), C. E. Hinds (R. 270), and Sam Hanna (R. 269), are each engaged in different businesses and testified to the same effect.

A. J. Scrivener, who is engaged in the business of distributing and manufacturing food products, stated (R. 268) that 85 per cent of the movement of commodities from wholesale and branch wholesale houses to customers is now done by motor trucks.

All of the witnesses agree that in the absence of regulation of the rates of contract carriers it will be

impossible to quote stabilized prices from day to day. They state that since the businesses in which they are engaged are operated upon a narrow margin of profit that the discriminatory rates and practices of contract carriers have had a disastrous effect on them.

(*h*) *Producers and Interior Markets.*

Contract carrier operations have had the same far-reaching and injurious effects upon the producer and his interior markets as have been noted with respect to businesses generally.[16]

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[16] "Trucking has rendered certain local marketing points of less importance than heretofore." 182 I. C. C. 295.

"The trucking of livestock not only lessens the opportunities of local shipping agencies, whether livestock cooperatives or individual buyers, whose primary function has been that of assembling small lots for carload movement, but also affects the competitive relationship of the markets themselves by introducing new cross-country movements and changing the spread in the cost of reaching various markets." 182 I. C. C. 289.

Livestock trucks and those hauling cotton and other seasonal products "have large amounts of unused capacity on the return movements. They therefore bid for return loads of feeds, fertilizers and general merchandise used on farms in communities through which the trucks pass. * * * The competition between trucks for this outbound traffic forces the rates down with the result that jobbers at local points have lost a large part of their business, and the railroads part of their less than carload traffic." 182 I. C. C. 289.

For example, consider cotton which is the principal crop produced in Texas. The effect of unregulated contract carriage upon that commodity and its marketing and upon those who produce it is shown by the testimony of Lawrence Westbrook who said (R. 257):

> "I have had experience as a cotton merchant, as a cotton producer, and as the owner of cotton gins. Practically my whole business life has been engaged in different phases of the cotton business, and especially for the past 10 years I have studied the problems of cotton marketing from the producer's standpoint. I formerly organized and operated a cotton cooperative association, and the past year I organized for the State of Texas the Texas Cotton Cooperative Association.
>
> "The destruction of the interior cotton market is an economic catastrophe for the producer, as well as for the general business structure in the interior. Any saving resulting to the producer from transportation charges by the trucking of cotton by motor truck has not, in my opinion, compensated the producer for his loss resulting from the disruption of his customary competitive local interior markets, which disruption and destruction of such local interior markets has been largely contributed to by the heretofore ineffectual regulation of the transportation of cotton by motor truck".

Contract carrier operations have produced similar problems with respect to practically all of the farm products of the State and have similarly demoralized the marketing of those products.

(*i*) *Public Interest Generally.*

It was established that motor truck transportation cannot adequately serve the people of Texas in all their transportation needs (Finding XI, R. 174). Since this is true the regulation of the minimum rates of contract carriers is necessary in the public interest to conserve and maintain an adequate transportation system capable of serving the entire needs of the people of Texas (Finding XII, R. 174).

It was established also that there has been an enormous increase in the number of contract carriers within recent years, and that the business which they now conduct is a very large factor in commercial transportation. In the aggregate they have produced a serious problem (Finding XXII, R. 176).

It is essential, in the public interest, that all available carriage service, including common carriers by rail and by road, be coordinated in order that the public may have a safe and dependable transportation system. This cannot be accomplished unless private carriers operating on the same roads with common carrier trucks and parallel to the lines of railway are brought under just and reasonable regulation and their service is brought into relation with that of other carriers (Finding XXV, R. 176).

The court found that the granting to the Commission of the power to grant or refuse a permit to contract carriers, power to fix minimum rates, the forbidding of rebates and discriminations by contract carriers and

the other regulations of the act applicable to them are reasonably designed to effect the State's declaration of purpose and policy that the use of highways by motor carriers for hire is a business affected with a public interest. It further found that the evidence in this case supports the legislative declaration that such business is one affected with a public interest (Findings XXVIII and XXIX, R. 177-178).

With such a vivid picture of highway conditions before it, the trial court was justified in declaring:

> "The record in this case teems with evidence supporting the State's declaration of purpose and policy that the use of the highways is affected with a public interest and that the conduct of unregulated business over it is bringing about the prevalence of the mischiefs and evils which the legislation in question is designed to avoid" (R. 138).

Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 203-4, may have exercised a prophetic discernment of such conditions on the highways and the vital public interest involved therein when he declared:

> "Within the State power then, is that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turn-

> pike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a specific purpose, or is clearly incidental to some power which is expressly given."

The inherent public interest involved in the use of public highways was recognized in the fundamental law of Texas, for in adopting its Constitution it was declared in Section 3, Article 12:

> "The right to authorize and regulate freights, tolls, wharfage, or fares levied and collected or proposed to be levied and collected by individuals, companies or corporations for the use of highways, landings, wharves, bridges, and ferries, devoted to public use, has never been and shall never be relinquished or abandoned by the State, but shall always be under legislative control and depend upon legislative authority."

And in Section 5 thereof:

> "All laws granting the right to demand and collect freights, fares, tolls or wharfage, shall at all times be subject to amendment, modification or repeal by the Legislature."

These two constitutional provisions clearly evidence a purpose and intention of the State from earliest times to preserve and appropriately exercise its power to control the freights, fares and charges of those using its highways in the public interest.

The provisions of this act are only a part of the State's scheme to regulate its internal commerce which includes "the power to enact all appropriate legislation for its protection or advancement; to adopt measures and foster, protect, control and restrain". *T. & N. O. Railroad Company v. Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548.

Appellants strongly rely upon this Court's pronouncements in *Smith v. Cahoon, Frost v. Commission, Michigan v. Duke,* and *Buck v. Kuykendall, supra.*

We believe the brief discussion of the Duke and Kuykendall cases, under our first proposition, show their inapplicability to this case. In both those cases an interstate carrier was involved. In the Kuykendall case the State attempted to stop such a carrier at the State line. Here no such thing is attempted. That question was settled for this law in *Sage v. Baldwin,* 55 Fed. (2nd) 968. There is no attempt here to impose anything but the strictly police regulations of the act upon interstate carriers. Neither does the act undertake to impose common carrier burdens and duties upon contract carriers of either class. Both of those cases were evidences of this Court's determination to leave interstate commerce free of unreasonable burdens.

But it appears from close examination of the opinion in the Duke case that there was evidently no showing whatever that plaintiff's business was affected with a public interest. He had a contract to carry for three concerns, and limited his activities to his contract. Mr. Justice Butler, in his opinion, said:

> "He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to the duty to carry for others. The public is not dependent on him or the use of his property for service; has no right to call on him for transportation."

We take it the statement that the complainant "does not devote his property to any public use", was merely a statement of facts deducible from the record then before the court and was not a statement of a legal conclusion in any manner applied to a state of facts similar to the one now before this Court. If this be true it deprives the opinion of any controlling effect in a case where facts are presented showing that contract carriers on the highways of a State are affected with a public interest. Duke, however, was an interstate carrier.

In the Frost case there is presented a holding to the effect that a State cannot require contract carriers to become common carriers; that to do so would be to violate Federal rights, particularly under the Fourteenth Amendment.

In discussing the issues, the court took special note of the argument presented by the State, that, since these contract carriers could be legally excluded from the highways, the granting of a license to conduct their business thereon could be accompanied with any condition the State might wish to impose. But this was met with the view that a Federal right could not be conditioned away; in other words, that the State could refuse the license if it wished, but if granting it, could

not exact as a condition of the grant the abandonment of rights under the Federal Constitution.

The important consideration in analyzing that opinion is that the Supreme Court of California assumed the State had a right to regulate the business of contract carriers merely upon the consideration that it could grant or withhold from such carriers the right to conduct their business on its highways. Again, it is important to note that there was no showing made and no contention that the business of this particular carrier or the class of which he was a member, was affected with a public interest. It is necessary, however, to take note of certain language in the opinion rendered by Mr. Justice Sutherland, as follows:

> "It is very clear that the act as thus applied is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. This, in effect, is the view of the court below plainly expressed."

We cannot disregard the boundaries set forth in that statement. In order to justify what the California Legislature attempted to do, this Court found it indispensable to discern in the enactment proper regulation of the use of the public highways. As plainly does it also appear that regulation of the business of those engaged in using the highways was put aside as a matter of course. What the State of Texas proposes

to do in the instant case is not only to regulate the use of its highways, but also to regulate the business of the contract carriers making use thereof, and the right to do so is predicated at least in part upon the consideration that contract carriers are shown to be engaged in a business affected with a public use. Nothing of the sort appeared in the California case.

We now come to the Cahoon case. The State of Florida passed a regulatory statute affecting contract carriers. They were required to procure certificates of convenience and necessity before being permitted to operate. They were required to give a bond running in favor of the public and of the shippers who patronized them, and otherwise were required to be subject to regulations ordinarily affecting common carriers.

Mr. Chief Justice Hughes, in rendering the opinion of the Court, held that the regulations were such as to impose upon those contract carriers identical obligations with those of common carriers, and that it would be impossible to differentiate, in the light of these facts, between the effect of the Florida statute and the effect of the California statute discussed in the Frost case.

Among other things we find that the Florida statute, as construed by the Court, is based upon the State's power to regulate the use of its highways. Note this language:

> "No separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper oper-

> ation affecting the use of the highways, which may appropriately relate to private carriers, as well as to common carriers. All carriers within the act whether public or private are put by the terms of the statute upon precisely the same footing. * * * Such a scheme of regulation of the business of a private character, such as the appellant's, is manifestly beyond the power of the State."

We wish to note especially the last sentence:

> "Such a scheme of regulation of the business of a private character, such as the appellant's, is manifestly beyond the power of the State."

The Court does not say that a similar scheme of regulation applied to some contract carriers or to all contract carriers under some circumstances, even though regulating the business itself, would be beyond the power of the State. The import of the language is limited in that it can have application only to the peculiar status of the appellant in that case and to the peculiar circumstances surrounding his business.

There is no reference whatever in that case to an effort on the part of the State of Florida to show that contract carriers in general had created such a problem on the highways of the State as to enforce the conclusion that the business was affected with a public interest. On the contrary, as in the Duke case and the Frost case, it appears that the Court stays the hand of the State, in each instance, from regulating the business of the carriers involved, because under the circumstances before the Court the State's power to do so did not appear.

It is manifest, however, that the constitutional limitations found in the Fourteenth Amendment cannot stay the hand of the State in its effort to regulate the business of contract carriers on its highways, where it has been made to appear, as in this instance, that the business is affected with a public interest, and that the regulations provided are demanded at the hand of the sovereignty in the interest of the public welfare.

For all of these reasons, we submit that the record supports the legislative declaration and the Court's finding that the class of contract carriers who are reached by the act are engaged in a business affected with a public interest and justifies the regulations which have been applied to their operations on the public highways.

III.

The act imposes substantially different schemes of regulation upon common and contract carriers and there is a clear differentiation between the two classes. It authorizes no greater regulation of appellants' business than is essential to the accomplishment of the valid purposes of the act. (In answer to Appellants' Point III, R. 290-291.)

There has necessarily been considerable discussion of this proposition under Points I and II, and all unnecessary repetition will be avoided. A casual reading of the act is sufficient to show the clear line of separation which it draws between contract and common carriers, and that the burdens imposed by it upon contract carriers are less onerous than those applicable to common carriers.

The police regulations having direct relation to traffic safety and highway protection and convenience, are applicable alike to both classes and are not in controversy. Therefore, we now parallel for comparison only those obligations imposed upon the respective classes which are brought in question by the appellants:

(1) Common carriers must hold themselves out to the public to perform any and all transportation services for all members of the public to the limit of the capacity of the common carrier facilities. This is the burden of the common carrier.

Contract carriers have no such burden and the act in question imposes none.

(2) Common carriers are not defined by the act. They are left by definition exactly where they are by judicial decision (R. 13).

Contract carriers are not declared to be, nor are they required in fact to become common carriers. They are defined as "motor carriers" operating "other than as common carriers" (R. 13).

These distinctions have been sufficiently discussed under propositions numbers I and II.

(3) One desiring to operate as a common carrier is required to secure a certificate of convenience and necessity. To procure a certificate, a common carrier must show in detail in his application his exact route, the condition of the highways, his schedule, the routes and service of other carriers serving the affected ter-

ritory, the inadequacy of existing transportation facilities, and wherein additional service or facilities are required, his financial ability, his responsibility, and that of his organization and personnel; a description of his vehicles, the location of depots or termini proposed to be used; his experience in the business of transportation and the character of bond or insurance he proposes to give to protect the public (Secs. 9 and 10, R. 20-22).

One desiring to operate as a contract carrier is required to procure only a permit. An applicant for a permit is only required to show his financial condition, the nature of his proposed service, substantially the territory to be covered including the condition of the highways and a description of his vehicles (Sec. 6, R. 17-18).

(4) The common carrier must assume the full burden of proof in support of his application, and particularly must establish that public convenience and necessity require the particular operation he proposes (Sec. 3, R. 13-14; Sec. 8, R. 20; Secs. 9 and 10, R. 20-22).

A contract carrier is not necessarily required to assume any burden of proof. He is required to file his application and a hearing is provided for (Secs. 11 and 12, R. 22-24). The act merely provides that no permit shall be granted if the Commission be of the opinion that the proposed operation will impair the efficient public service of any authorized common carrier then adequately serving the same territory (Sec. 6(*c*), R. 18).

(5) Common carrier schedules are regulated by the Commission (Sec. 4(*a*), R. 14).

It possesses no such power with respect to contract carriers.

(6) Common carrier service is subject to regulation (Sec. 4(*a*), R. 14).

Contract carrier service is not subject to regulation.

(7) Common carrier certificates may be transferred (Sec. 5, R. 15-17).

Contract carrier permits may not be.

(8) The application fee for a common carrier is $25, with an annual fee of $10 per vehicle thereafter (Sec. 17, R. 29-30).

The fees for a contract carrier are only $10 on application with similar annual fees (Sec. 7, R. 19-20).

(9) The Commission is empowered to prescribe specific rates, maximum or minimum, for a common carrier (Sec. 4(*a*), R. 14).

For a contract carrier it may prescribe minimum rates only, and then only where such carrier is operating in competition with common carriers, this power being predicated solely upon the necessity of protecting the public interest involved (Sec. 6(*aa*), R. 19).

We wish to call special attention to the fact that, under the provisions of Section 6(*c*), contract carriers, in order to secure a permit, are not required to prove the public convenience and necessity for their proposed operations. A contract carrier is entitled to a permit if it appears that there is no common carrier

then adequately serving the territory involved and he is likewise entitled to a permit if it appears that his proposed operation will not impair the service of a common carrier or carriers then serving the territory involved. In either of these cases a contract carrier is entitled to a permit without regard to the public necessity for his service and without regard to any public convenience which may be served by his operation.

These illustrations are sufficient answer to appellants' contention that the act imposes the same burdens upon common and contract carriers. That the two classes are separately and distinctly treated is too obvious for further comment. Moreover, these examples further demonstrate that the act does not lack the differentiation between the two classes which the Cahoon case clearly indicated is necessary.

Appellants contend the act unreasonably regulates their business. We have shown, under our first proposition, that it does not require them to devote their property to any different or greater public use than they had already voluntarily devoted it; that the limited regulatory powers of the Commission are extended only to those phases of their operations which adversely affect the public welfare and that such regulations as are imposed upon them are reasonably related to the valid purposes of the act.

Under our second proposition we presented a summary of the facts of record, together with the findings of the trial court, which show the effect of the unregulated operations of appellants and others of their class. The undisputed facts show that within the past five or six years contract carriers have practically destroyed

the regulated common carrier truck lines, and the trial court found that a continuance of these conditions will completely destroy them; that contract carriers have seriously impaired railway service and have made such inroads upon their business that all have sustained large financial losses, and that many of them are threatened with bankruptcy; that they have destroyed interior markets; that they have discriminated between shippers and communities and have injured business conditions generally.

By reason of these facts we hold that the businesses of appellants are affected with a public interest. We have already cited and discussed the authorities supporting this view. We have shown that the regulation of their rates and practices is reasonable and is essential for the preservation of the public interest involved.

If we are correct in these conclusions, then appellants' argument that the act arbitrarily and unreasonably regulates their business is unsound.

In looking back one necessarily observes the close relationship which has always existed between means of transportation and the progress and development of nations. Too, it is interesting to note how one form of transportation has displaced another through the centuries; how man has constantly struggled to annihilate time and distance between his markets.

The establishment of shorter, better or quicker routes and means of transportation has usually been accompanied by change and growth. When the steamship displaced the sailboat its effect was felt immediately. It remained for the railway, however, to

revolutionize land transportation.[17] Its effect upon the development of our own country is readily apparent. It is no exaggeration to state that this nation could never have developed into its present preeminent position in industry and agriculture without rail transportation. The evidence shows that it cannot maintain this position without railroad transportation. The evidence further shows that motor vehicles cannot adequately serve the transportation needs of the people.

The introduction of motor vehicles on public highways has greatly modified the transportation problems of this State and of the Nation. It must be acknowledged, of course, that they have come to have a definite and important function in our transportation scheme and no doubt are here to stay.

The specific purpose of the act here involved is to define that function; to ascertain as nearly as possible

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[17] "Historically speaking, the railroads have brought into being over a span of 100 years a transportation system which was calculated to develop and serve every essential need for land transportation. Their systems reach into practically every county of the nation and embrace a network of interdependent main, subsidiary, and feeder lines. The cost of serving many points which neither originated nor received traffic in sufficient volume to make the service rendered profitable was borne from the returns of the system as a whole. Communities developed which were solely dependent on a permanent year-round rail transportation service. Furthermore, some low-grade traffic drew support from the greater rate-paying ability of high-grade traffic. Highway and other transportation tends to destroy this unity." 182 I. C. C. 363.

the most useful and economical field for the truck in serving the State's transportation needs. In short, it seeks to coordinate motor transportation with other established transportation agencies for the general good.[18]

The chief obstacle to the accomplishment of that purpose is the so-called contract carrier. His operations have attained such magnitude that he can no longer be ignored and if he is permitted to continue his operations without restraint or regulation, he will produce greater mischiefs.

Before the advent of motor transportation, private carriers created no serious difficulties in the field of

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[18] "The public has permitted uneconomic developments to occur within an industry capable of great public service. It is therefore likely that adequate regulation would strengthen and stabilize the industry to the extent it controls the number of operators and the amount, kind, and extent of service. Coordination, under regulation, of motor and rail transportation may have the same effect. 182 I. C. C. 363.

"It is admitted by all, we presume, that most traffic now moving by motor vehicle would, in the absence of the motor vehicle, be moved by rail if it moved at all. There is extensive evidence of record showing the effect that motor vehicle transportation has had on the traffic and revenue of railroads. But the essential purpose of this inquiry is constuctive and, we take it, its aim is not so much to discover a means for the elimination of this competition between the old and new form of transportation as it is to learn how the old form and the new form can best and lawfully be fitted into the general transporation scheme so that each may serve the public within its most economical sphere". 182 I. C. C. 273.

transportation. "Private carriers" were judicially defined at a time when their field of operations were limited and were only of small local consequence.

Modern highways and the motor truck have created a new type of carrier. Whatever he should be called, we have shown he represents a distinct class of carrier to which the act in question applies a separate and distinct set of rules and regulations.

For these reasons we submit that appellants' argument under their third proposition is unsound. The Court's action upholding the legislative judgment in this regard should be sustained.

IV.

Section 6(d) authorizing the issuance of special permits for the transportation of certain named commodities creates no unlawful discrimination because any person operating thereunder is subject to the regulations applicable to the class of which he is a member. (In answer to Appellants' Point IV, R. 291.)

(*a*) *Even if section* 6(*d*) *is not open to that construction, appellants are in no position to complain since they do not haul those commodities and have shown no injury.*

(*b*) *The act is clearly severable, and if section* 6(*d*) *is invalid, it, and not the act, must fall.*

Section 6(*d*) authorizes the Commission to issue special permits to persons desiring to engage in the business of hauling livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber

when in its natural state, farm machinery and grain. The Commission is given authority to fix and prescribe special terms, conditions and restrictions governing such operations.

It will be observed that the special permit provision is a part of a section dealing with contract carriers. Evidently, the Legislature believed that most persons carrying those commodities would operate under contracts. However, this will not necessarily be true in all cases, since many of them will, in fact, be common carriers.

In either event, one operating under a special permit is a "motor carrier" as that term is defined in Section 1(*g*) (R. 13). As such he is subject to all the applicable provisions of his class, whether he be a common or contract carrier. There is nothing in Subdivision (*d*) of Section 6 to indicate that the Legislature intended otherwise.

Appellants take the position that persons operating under this subdivision are not subject to the rate and service regulations applicable to their particular class. They would have the court adopt such a construction in order that there might be merit in their contention that the situation here is identical with that in *Smith v. Cahoon, supra.*

If there be doubt about which construction is correct, this Court will adopt the one which avoids "grave and doubtful constitutional questions". *Texas v. Eastern Texas RR. Co.,* 258 U. S. 204; *U. S. v. Delaware & Hudson Company,* 213 U. S. 366, 407-8

In candor, we feel it our duty to advise the Court that the Commission was in some doubt of the meaning of this subdivision in the beginning. The question was submitted to the Attorney General of Texas. In an official opinion he construed the act to the effect that persons operating under special permits are subject, in all substantial particulars, to those provisions of the act which are applicable to the particular class to which they belong. In other words, special permit operators are either contract or common carriers and must submit to regulation as such. This construction of the act is now adhered to by the Commission.

Thus construed and enforced, Section 6(*d*) makes no discrimination either in favor of or against any commodity and the vice pointed out in the Cahoon case does not apply.

We believe the construction we have placed on Section 6(*d*) is the only reasonable one which could be adopted when it is considered in connection with the broad purposes of the act and its various provisions. Moreover, it should be observed in this connection that in this case the court is free to judge the meaning of the act for itself and without feeling bound by the construction of a state court thereon. Herein again the situation differs from that in the Frost and Cahoon cases.

(*a*) *Even if section* 6(*d*) *is not open to that construction, appellants are in no position to complain since they do not haul those commodities and have shown no injury.*

There is nothing in the record of this cause to show that appellants have suffered any injury or prejudice

whatever as a result of the Commission's issuance of special permits. They have not applied for such permits themselves and, therefore, have not been denied one. They do not haul the commodities named in Section 6(*d*). So far as the facts in this case show, those operating under special permits stand on the same ground and are subjected to the same burdens as other carriers under the act.

Even if the Commission should issue permits under such terms and conditions as to discriminate against appellants and others, complaints should be made against the order of the Commission. It would be the Commission's order granting the permit which was discriminatory and not the law under which the Commission acted.

The trial court disposed of this contention of appellants as follows:

> "We may, in passing, notice but to reject it, the complaint that the act is invalid because Sub. (*d*) of Sec. 6 gives the Commission authority to grant special terms to carriers of certain kinds of goods, thus working a discrimination. Of this complaint it is sufficient to say that it will be time enough to make it when rights have been infringed by action under the section. If plaintiff takes out a permit, and the Commission thereafter, under authority of the section, attempts unlawfully to confer a permit upon another on less onerous terms, plaintiff may then apply for relief. *Frost v. Oklahoma,* 274 U. S. 719. Besides, this section is in terms made separable from the rest of the act, and if it is invalid it, and not the act, will fall" (R. 140).

(b) The Act is Clearly Severable, and if Section 6(d) is Invalid It, and Not the Act, Must Fall.

While we are confident there is no merit in appellants' position under this proposition, it calls for a brief discussion of the doctrine of severance. As the trial court stated, if Section 6(*d*) is invalid it, and not the act, will fall.

This is true, first, because the act is remedial in nature and will be liberally construed. It is designed to correct defects, mistakes and omissions in the administrative policy of the State. More specifically, it is a regulatory and administrative measure. The acts of Congress regulating commerce between the States are conspicuous examples of this character of legislation. This view of such an act is supported by the overwhelming weight of authority in this nation. *Doering v. Walters,* 140 N. E. 74; *Smith v. People,* 51 Colo. 270; *State v. Lipkin,* 84 S. E. 340; *Railway v. United States,* 232 Fed. 349; *Johnson v. Southern Tea Company,* 196 U. S. 1; *Schlemmer v. Buffalo Railroad Co.,* 205 U. S. 1; *Southern R. R. Co. v. United States,* 222 U. S. 20; *San Pedro R. R. Co. v. United States,* 213 Fed. 326; *Great Northern Ry. Co. v. United States,* 218 Fed. 302; *Railway Company v. Voelker,* 1932 Fed. 522; *Smith v. People,* 117 Pac. 612; *Texas v. Eastern Texas Railroad Co.,* 258 U. S. 204; *United States v. Delaware & Hudson Co.,* 213 U. S. 366, 407-8; *Clark v. Poor,* 20 Fed. (2d) 182, affirmed in *Clark v. Poor,* 274 U. S. 554.

Rules of construction which are followed by the courts of Texas are in complete harmony with the decisions which have been cited. *Ex parte Curly,* 255 S. W.

730; *White v. Maverick County*, 35 S. W. (2d) 107; *Ex parte Wright*, 82 Tex. Crim. Rep. 247; *Ex parte Parr*, 200 S. W. 404; *Griffin v. State*, 218 S. W. 494; *Russell v. State*, 228 S. W. 566; *Scott v. State*, 233 S. W. 1097; *Goforth v. State*, 241 S. W. 1027; *Lytle v. Halff*, 12 S. W. 610; *Ex parte Towles*, 48 Tex. 413; *Chambers v. Baldwin*, 274 S. W. 1011.

That the various provisions of this act are severable was definitely established in the case of *Sage v. Baldwin*, 55 Fed. (2d) 968.

There is another rule which it is important to consider in connection with the question of severance in this case. In Section 6(*d*) there is a clear expression of the legislative intent with reference to its divisibility (R. 18). Section 23 (R. 32) makes a similar statement with reference to each section, subsection, clause, sentence and phrase of the act. It is clear that the lawmakers intended the act to be divisible. Not only is this intention expressed with reference to Section 6(*d*) but with reference to every other requirement of the act. In the absence of such a declaration the courts do not feel free to apply the rules of severance liberally unless that which remains after the process leaves the purposes of the act substantially unaffected. *Williams v. Standard Oil Company of Louisiana*, 278 U. S. 241. Where, however, there is such a declaration, the rule as announced in that case is as follows:

> "The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, with the presumption that the Legislature intended the act to be divisible; and this presump-

> tion must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that, the invalid part being eliminated, the Legislature would not have been satisfied with what remains."

Appellants' contention that if Section 6(*d*) is invalid the whole act must fall is not well taken. The fact that there is a clear legislative expression that the act should be divisible is conclusive evidence that the Texas Legislature intended the act should be severable if necessary to meet any constitutional requirement.

V.

The act is not discriminatory as between carriers for hire and persons transporting their own property because the circumstances and conditions of operation are substantially dissimilar. (In answer to Appellants' Point V, R. 291.)

Appellants contend that the act is unlawfully discriminatory because it does not apply to persons transporting their own property in their own vehicles over the highways. They make the point that while contract carriers are required to obtain permits and are subject to rate regulation, no such obligations are imposed on those transporting their own property. The mere statement of their proposition suggests a sufficient answer to it. In making this argument they but emphasize the substantial differences existing between their situation and that of private hauls as an incident to one's business. Obviously, the Legislature cannot fix a rate

where none is charged. It cannot regulate a business on the highways where there is none to regulate.

Appellants complain they are required to secure chauffeur's licenses, but neglect to inform the court that a similar requirement is imposed on all truck operators in another act adopted by the Legislature (Chapter 282, Acts 1931, sustained in *Sproles v. Binford, supra*).

As a matter of fact, every regulation of the speed, weight, or dimensions of trucks which are imposed upon appellants apply uniformly and equally to all other persons operating trucks upon the highways. (See *Sproles v. Binford, supra.*)

It is true the act authorizes the Commission to adopt special regulations for the government of trucks carrying property for hire in the interest of safety and highway protection. But this Court will not assume, as appellants have done in their argument, that the Commission will perform its duties in an unreasonable or unlawful manner. Certainly they have not shown the existence of any such unreasonable or discriminatory regulations at this time.

As a matter of fact, the Texas Legislature, by this act, has simply applied regulations to carriers who have been judicially recognized as distinct and separate classes for a great many years. The differences between a class making a constant and extensive use of public highways as a place of business and that class making only a limited or incidental use in the ordinary and usual pursuits of life, are too obvious to require further discussion. The distinctions between the

classes are based upon the extent and manner of those uses, and that alone. As this Court said in *Sproles v. Binford, supra:*

> "But the legislature in making its classifications was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which, by reason of their extensive as well as constant use of highways, brought about the conditions making the regulations necessary. *Continental Baking Company v. Woodring, supra.*"

The classifications and distinctions made by the act are based upon substantial differences of fact, and there is a rational basis for them. *Sproles v. Binford, supra; Lindsley v. Natural Carbonic Gas Company,* 220 U. S. 61; *Keokee Coke Company v. Taylor,* 234 U. S. 224; *Miller v. Wilson,* 236 U. S. 373; *Smith v. Cahoon, supra.*

Conclusion.

The act under attack in this cause seeks the accomplishment of great purposes. One of them is to prevent the abuses and discriminations universally practiced by the so-called "private contract carrier". The shipping public is entitled to equality and fairness in its freight bills. The contract carrier has not given it to them. Again, the public, because in the end it must depend upon the great common carrier systems, is entitled to efficient service and economical rates. The unregulated contract carrier has very seriously impaired the efficiency of that service and has contributed much to the conditions making increased rail rates nec-

essary. The act is intended to and will restore interior markets, stabilize business conditions generally, and will divert unnecessary and uneconomical hauls from the highways to the railways. In accomplishing these desirable ends the hazards and dangers for the usual and ordinary use of the highways will be greatly reduced and highway damage and maintenance expense will be kept within reasonable bounds.

As Mr. Chief Justice Hughes stated in the Sproles opinion:

> "It is said that the exception was designed to favor transportation by railroad as against transportation by motor trucks. If this was the motive of the legislature, it does not follow that the classification as made in this case would be invalid. The State has a vital interest in the appropriate utilization of the railroads which serve its people as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges.
>
> "It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain".

That statement encompasses the State's problem and sustains its power to solve it in the manner here proposed. However much difference of opinion there may be concerning the basis for the exercise of this power by the State, there is, as stated by the Chief Justice, no constitutional ground for denying it.

Respectfully submitted,

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